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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF RHODE ISLAND.

EDWARD C. STINESS,

REPORTER.

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1911.

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DEC 2 1911

JUDGES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. EDWARD C. DUBOIS.

ASSOCIATE JUSTICES.

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RHODE ISLAND REPORTS—VOL. XXXII.

These reports are published in accordance with the provisions of chapter 277 of the General Laws of 1909 of the State of Rhode Island.

The cases reported include the decisions, opinions, and rescripts of the Supreme Court, involving questions of law, pleading, or practice, from Dec. 19, 1910, to June 30, 1911.

EDWARD C. STINESS,

Reporter.

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ARTICLE XIV OF AMENDMENTS.

"Section 1.—nor shall any state deprive any person of life, liberty or property, without due process of law."

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- Cap. 454, § 1, passed May 7, 1909. "An act in amendment of chapter 1592 of the public laws, entitled "An act concerning registration of motor vehicles," etc. *State v. Buchanan*, 493.

CASES
HEARD AND DETERMINED
BY THE
SUPREME COURT OF RHODE ISLAND.

JOSEPH DAWISKI, Admr., vs. NATICK MILLS.

DECEMBER 19, 1910.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Pleading. Declaration. Duplicity. Amendment.*

Where it is conceded that a declaration is bad for duplicity, and it appeared on argument upon demurrer that plaintiff relied upon a case at variance with the allegations of his declaration, it is unnecessary to consider further objections to the declaration, but plaintiff should move to amend in order that it may conform to the truth of the case.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff, and overruled.

DUBOIS, C. J. This is an action of trespass on the case for negligence resulting in the death of the infant daughter of the plaintiff, brought by her father, the administrator of her estate, to recover damages therefor.

The plaintiff's declaration reads as follows:

"Joseph Dawiski, of Warwick, County of Kent, State of Rhode Island, administrator of the estate of Bronislawa Dawiski, plaintiff, complains of the Natick Mills, a corporation legally created, located and doing business in Providence, State of Rhode Island, defendant, who has been summoned by the sheriff to answer the said plaintiff in an action of case.

“For that whereas the defendants were the owners of certain land and buildings situated in the Town of Warwick and had the control over that part of said land where there was a certain cesspool or cistern located on said land, the plaintiff avers that there was a certain cover on said cesspool or cistern, and that said Bronislawa Dawiski, a child of tender years, the daughter of the plaintiff Joseph Dawiski, while in the exercise of due care and diligence on her part, to wit, on the 20th day of July, 1908, at said Warwick, stepped upon the cover of said cesspool or cistern, fell into said cesspool or cistern and was killed.

“And the plaintiff avers that the said cover of said cesspool or cistern was not securely and safely placed on said cesspool or cistern or safely locked and fastened but that said cover of said cesspool or cistern tipped and was liable to tip and that the said defendants well knew or by reasonable prudence and observation should have known that the said cover of said cesspool or cistern was not securely and safely placed on said cesspool or cistern or safely locked and fastened, but that said cover of said cesspool or cistern tipped and was liable to tip. The plaintiff avers that said Bronislawa Dawiski was a child of tender years of the plaintiff, Joseph Dawiski, who was a tenant of the said property of the said defendants, and had a right to be upon said property, and that said Bronislawa Dawiski, being a child of tender years, was ignorant and had no reason to believe that said cover of said cesspool or cistern was not securely and safely placed on said cesspool or cistern, or not safely locked and fastened and that said cover of said cesspool or cistern tipped and was liable to tip.

“And the plaintiff further avers that the said defendants being in control of said part of said land where said cesspool or cistern was located on said land and being so thereof informed, as aforesaid, and that said Bronislawa Dawiski, having a right to be upon said property and being ignorant as aforesaid, it then and there became and was the duty of said defendants, their agents and servants to warn her, the said Bronislawa Dawiski, of the fact that said cover on said cesspool or cistern tipped and was liable to tip, and of the dangers connected therewith; and

it was the further duty of the said defendants, their agents and servants to provide a cover on said cesspool or cistern that would not tip or be liable to tip, and reasonably inspect said place where said cesspool or cistern was located to see whether said cover on said cesspool or cistern was securely and safely placed on said cesspool or cistern, so that said cover would not tip or be liable to tip, but that the said defendants, their agents and servants wholly unmindful of said duties in that behalf and grossly negligent and careless in that particular, did not warn her, the said Bronislawa Dawiski of the fact that said cover on said cesspool or cistern tipped and was liable to tip, and of the dangers connected therewith and did not provide a cover on said cesspool or cistern, that would not tip or be liable to tip or securely and safely place, lock and fasten said cover on said cesspool or cistern so that said cover would not tip or be liable to tip and did not reasonably inspect said place where said cesspool or cistern was located, to see whether said cover on said cesspool or cistern was securely and safely placed on said cesspool or cistern so that said cover would not tip or be liable to tip, whereby the said Bronislawa Dawiski, while rightfully on said property of said defendants, and in the exercise of due care and diligence, fell into said cesspool or cistern as aforesaid.

"The plaintiff avers that said Bronislawa Dawiski in falling, was killed and drowned. The plaintiff Joseph Dawiski, avers that he is the father of said Bronislawa Dawiski, and that he sues for the death of said Bronislawa Dawiski for the benefit of himself as the only heir-at-law of said Bronislawa Dawiski.

"To the damage of the said plaintiff in the sum of Five Thousand dollars, and therefore he brings this suit."

To this declaration the defendant demurred, and as reasons therefor assigned the following:

"First, the facts as stated in said declaration show no duty towards the plaintiff imposed by law upon the defendant.

"Second, the said declaration shows no cause of action against the said defendant by the said plaintiff.

"Third, it appears by the said declaration that the proximate

cause of the accident was the exposing of the child by the parents to the risk which was as obvious to the parents as to the defendant.

"Fourth, the declaration sets out and alleges several distinct and independent breaches of duty, and this it is ready to verify."

Upon hearing, the foregoing demurrer was sustained by the Superior Court, and the plaintiff duly excepted to said ruling. The case is now before this court upon the plaintiff's bill of exceptions.

The first paragraph of the declaration that has reference to the fatal accident in question contains the statement that there was a cesspool or cistern on land controlled by the defendant, with a cover thereon, and that the deceased, in the exercise of due care, stepped upon the cover, fell into the cesspool or cistern and was killed. This statement, considered by itself, indicates a dangerous and defective condition of the cistern or cesspool, namely: in having a cover so constructed as to give way when stepped upon by a person using due care. The shape or size of the cover is not disclosed, neither is there any information given as to the material whereof the same was composed, whether it was made of wood, iron, glass, or paper. Nor are we apprised of the condition of the cover, as to its being new or old, worn or otherwise. The next paragraph also describes a condition of insecurity and danger in that the cover was not securely and safely placed on the cesspool or cistern or safely locked or fastened, but that it tipped and was liable to tip. There is nothing in the allegation to enable the reader to determine whether the pleader means that the cover was defective in its construction so that it could not be safely and securely placed upon the cesspool or cistern or be thereon safely locked or fastened, or whether, notwithstanding the fact that the same was designed and adapted to be securely and safely adjusted upon the cesspool or cistern and to be properly locked or fastened, it was improperly placed and left unlocked and unfastened. Neither is there any allegation of time to indicate how long before the accident the negligent condition, of which

(1) the plaintiff complains, had existed. The following paragraph relative to the duty owed by the defendant to the deceased and its breach of the same, sets out first, the duty to warn her of the liability of the cover to tip and the danger arising therefrom; second, the duty to provide a cover that would not tip; third, the duty to reasonably inspect the cistern or cesspool for the purpose of ascertaining whether the cover was securely placed so that it would not tip or be liable to tip, or whether the same was locked or fastened. In his brief, and during his argument, the plaintiff appeared to rely upon a state of facts totally at variance with the allegations contained in the declaration. On demurrer we must assume that the facts are set out in the declaration. We can not consider other and different circumstances. If the plaintiff has not described the case that he intends to sustain by proof, he should move to amend his declaration in order that the same may conform to the truth of the case. The plaintiff admits that the declaration is bad for duplicity in alleging different breaches of duty in one count, but suggests that such defect may be cured by amendment. As it is conceded that the demurrer must be sustained for the reason aforesaid, and as it appears that the plaintiff relies upon a case somewhat different from the one declared upon, we do not deem it necessary to make further comment upon the allegations of the declaration.

The plaintiff's exceptions are therefore overruled, and the case is remitted to the Superior Court for further proceedings.

George W. Bennett, Jr., for plaintiff.

Dexter B. Potter, Edward A. Stockwell, for defendant.

PATRICK MASTERSON vs. NAMQUIT WORSTED MILLS.

DECEMBER 13, 1910.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Negligence. Master and Servant. Assumed Risk. Defective Floor.*

Plaintiff, in going to the rear of his loom, turned his ankle, and in falling, his arm was caught in the belt, conveying power to the loom and injuring him.

Plaintiff claimed that he was injured through an inequality in the floor, un-noticed by him, but it appeared that he must have travelled over, or in close proximity to, this identical spot many thousand times without turning his ankle, the floor being in the same condition as it was when he went there to work and in addition, plaintiff swept that portion of the floor each night.

Held, that the accident from that cause was not one that a reasonable and prudent man could be expected to foresee the probability of, and therefore defendant was not negligent in constructing or maintaining the floor in that manner.

Held, further, that, assuming the negligence of defendant in that respect, the risk was obvious and assumed.

Held, further, that although plaintiff testified that he did not notice the defect, yet, as it would have been evident to his senses if he had used them, he could not avail himself of this excuse.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff, and overruled.

DUBOIS, C. J. The plaintiff, a weaver of twenty-two years' experience, who had been employed upon one of the defendant's power looms continuously for over seven months, at half-past four o'clock on the afternoon of Monday, May 6, 1907, which was a dark and stormy day, in going around from the front to the rear of his loom, for the purpose of tying a broken thread in the fabric which he was weaving, turned his ankle and fell in such a manner that his left arm was caught by the belt, whereby power was conveyed to his loom, and was drawn in and crushed between the belt and the loose pulley, upon which it was then running, the plaintiff having shifted the belt from the tight to the loose pulley, to stop the loom, before he attempted to tie the broken thread. Two feet from the back of his loom was the back of another loom, and each loom was propelled by means of a belt running from a pulley at the end of the loom, and about eleven inches from the floor, to shafting above the main alley, which was a passageway at the end of the looms referred to, and so called to distinguish it from the weaver's alley or space between the looms. This shafting was about nine feet above the floor and ran parallel with the main alley and about four feet from the end of the looms, so that each belt in operation ran diagonally out into the main alley. Neither belt was

boxed in or covered in any way, and in going from the front to the rear of the looms the weavers had to pass between the moving belts. It appears that it was necessary to do this every time a thread would break in the course of the weaving, which would happen at least once in half an hour, under the most favorable conditions, and very often much more frequently.

There is no evidence that the plaintiff ever had turned his ankle in any of the eight or nine thousand times that he must have gone, in the course of his employment by the defendant, from the front to the rear of his loom and, in returning, from the rear to the front thereof, upon which occasions he must, necessarily, in the limited space between the belts, have travelled upon, over, or in close proximity to the identical spot upon which his ankle was turned. The testimony is to the effect that at the time of the accident the floor whereon the plaintiff fell was in the same condition as it was when he came there to work, save for the wear and tear incident to its use, in which the plaintiff largely participated. The plaintiff, *inter alia*, testified, concerning the accident, as follows: "Q. What caused you to turn your ankle? A. This board, I suppose, that was patched up, this bad place in the floor. Q. What happened to you, did you slip on it, or what? A. No, my heel, I thought, just went on the end of it and turned me sideways, and I went down on the belt." It appears that there was a corner of a plank which projected into the weaver's alley at the back of his loom. The plank was some three-quarters of an inch in thickness and formed part of a runway six feet wide in the main alley aforesaid, and was laid upon the original floor of the room, which had become worn in places and especially at the point where the projecting corner came. This corner was formed by the junction, at their ends, of two planks of unequal width, in such a manner as to leave the projecting corner, formed by the inequality, next to the weaver's alley. The plaintiff testified that he never noticed this corner until after the accident, although, in addition to passing and repassing it as often as he was obliged to do for the purpose of tying threads broken in the course of the weaving, every night he swept the

"flyings" from the weaver's alley into the main alley, where they were swept up by a boy: "Q. Did you sweep over this place where the patch in the board was? A. I swept the boards, everything around there, just with the broom, dusted it out only on Saturdays and then you clean the machinery." It is manifest that in any sweeping that would be effective in removing the flyings from the weaver's alley to the main alley it would be necessary to pay particular attention to corners and projections where such particles would be likely to accumulate, especially in a place where the floor was badly worn.

At the conclusion of the testimony the justice of the Superior Court presiding at the trial directed the jury to return a verdict for the defendant, upon the ground that the plaintiff assumed the risk of walking over the runway and the dangers incident thereto. To this ruling the plaintiff excepted, and the case is before this court upon that exception.

In order for the plaintiff to recover in this action it is necessary for him to prove, not only that he was in the exercise of due care at the time of the accident, but also that the defendant was negligent and that the negligence of the defendant was the proximate cause of the plaintiff's injury. If the defendant was negligent, its negligence consisted in joining and maintaining the planks in the runway so as to leave a corner thereof projecting into the weaver's alley over a worn place in the floor, upon which a person exercising due care would be likely to turn his ankle and be caught by a moving belt, and in not warning the plaintiff of such danger. If such danger existed, and the same was latent, then it was the duty of the defendant to warn the plaintiff of a dangerous condition of which it had knowledge and concerning which the plaintiff was ignorant. If, however, such danger did exist, but was patent or obvious to persons exercising their senses in the usual manner for the purposes of observation, then there would be no necessity to give warning of a danger so apparent. For example, the danger of being caught by the moving belts was perfectly obvious to the plaintiff, and he needed no warning to avoid that danger. The particular danger which the plaintiff complains he was subjected

(1)

to, concerning which no warning was given him, was the danger pertaining to the corner of the plank in the weaver's alley, viz.: the danger of having his ankle turned thereon and thereby being thrown against the moving belt. Can this be said to be such a known and appreciable danger that the defendant was bound to take cognizance of it before the happening of the accident? Would an ordinarily careful and prudent man anticipate the probability of such an accident resulting from such a cause? If not, then the defendant was not negligent in not foreseeing it. If the defendant could not be expected to foresee the danger it could not be expected to give warning thereof. It is a matter of common knowledge and universal experience that ankles will turn, and that sometimes it is difficult to ascertain the cause thereof. The ankle itself may be weak and liable to turn upon slight provocation, or the shoe upon that foot may be ill-fitting or worn at the side or heel and thus assist in turning the ankle, or there may be a combination of both; either the shoe or floor or both may have become slippery, so that, if the foot was not placed firmly upon the floor in walking, a turned ankle might result. Illustrations might be produced indefinitely. As ankles do turn and are liable to be turned upon the most scientifically constructed highways and floors, it is safe to assume that no highway or floor ever was or ever will be made with a view of preventing ankles from being turned thereon. Evidence that a person had turned his ankle upon a public highway would fall short of proof that the same was defective. In the case at bar no evidence was offered concerning the condition of the plaintiff's foot or foot-wear at the time of the accident. The plaintiff's testimony that he thought he stepped upon the projecting corner of the board in question and supposed that he turned his ankle in consequence thereof was not contradicted, and therefore he claims that the cause of the turning of his ankle may be said to be established. The plaintiff does not claim that there was upon that occasion anything peculiar, unusual, or different in his use of the weaver's alley in going to repair the broken thread than there was in the thousands of times that he had used it before;

neither does he claim that the board or floor was different in any respect at that time from its previous condition while he had been using it. In the circumstances of the case we are unable to say that a reasonable and prudent man could be expected to foresee the probability that such an accident would be likely to happen from that cause, and therefore we do not find that the defendant was negligent in constructing or maintaining the runway in the manner in which it did. Moreover, even if we could hold that the defendant was negligent in its construction and maintenance of the runway, and that it did create the danger in the weaver's alley of which the plaintiff complains, the result would be the same; for we are also of the opinion that the same was as obvious to the plaintiff as it was to the defendant, and that therefore there was no necessity to warn the plaintiff concerning the same, and that, as the danger was obvious to the plaintiff, he assumed the risk thereof. It is true that the plaintiff testified that he did not notice the corner, but it seems incredible that he should have passed over or near it and have swept around or about it as often as he did without seeing or feeling it; and as it appears that it would have been evident to his senses if he had used them, he can not avail himself of the excuse that he did not notice what must have been perfectly apparent.

The plaintiff's exception is therefore overruled, and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

James B. Littlefield, Walter H. Barney, for plaintiff.

Vincent, Boss & Barnefield, for defendant.

ADIN B. HORTON, Appt., vs. AUGUSTUS F. AMORAL.

DECEMBER 19, 1910.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Exceptions. Time for Filing Transcript and Bill.*

Under the provisions of the statutes relative to prosecuting a bill of exceptions, the transcript of evidence and bill of exceptions are to be filed together in

the first instance; but in case of an extension of time for filing the transcript, the bill of exceptions need not be filed at the same time as the transcript, but within ten days thereafter; and it is not a jurisdictional requirement, in the prosecution of a bill of exceptions, that the filing of the transcript, should be prior to the time fixed by the court for the filing of the bill.

An order was made "Transcript of evidence etc., to be made and delivered by stenographer to party ordering same or his attorney of record, and to be filed in clerk's office on or before May 12, 1910. Bill of exceptions to be filed in clerk's office on or before May 21, 1910. May 21 the bill and transcript were filed.

Held, properly filed.

TROVER. Heard on motion of defendant to dismiss plaintiff's bill of exceptions, and denied.

DUBOIS, C. J. This is an action of the case on trover and conversion originally brought in a District Court and thence taken to the Superior Court upon a claim for a jury trial. Upon trial before a jury, the justice there presiding ruled that the appellant's claim for damages for the conversion of hay and straw should be excluded from the jury, and the appellant thereupon duly took an exception to said ruling. Within seven days after the rendition of the verdict in the case the plaintiff gave notice of his intention to prosecute a bill of exceptions to this court, and moved the Superior Court to fix the time within which he should file his bill of exceptions, transcript of evidence, etc. Whereupon another justice of the Superior Court, in the absence of the trial justice aforesaid, signed the following order: "Transcript of evidence, etc., to be made and delivered by stenographer to party ordering same or his attorney of record *and to be filed in clerk's office* on or before May 12th A. D. 1910. Bill of exceptions to be filed in clerk's office on or before May 21, A. D. 1910." On the twenty-first day of May the bill of exceptions and transcript were filed in the clerk's office. On May 27, the bill of exceptions, transcript, etc., were allowed and certified to this court. On September 27, 1910, the defendant filed in the office of the clerk of this court his motion to dismiss the plaintiff's bill of exceptions on the ground that the plaintiff did not file in the office of the clerk of the Superior Court a transcript of the testimony within the time limited by said court for filing the

same. This presents the following question for our determination: Does the statute contemplate as a jurisdictional requirement in the prosecution of a bill of exceptions, in a case where a transcript of evidence is necessary, the filing of the transcript of testimony in the clerk's office at a time prior to the time fixed by the court for the filing of the bill of exceptions, the time so fixed being not later than fifty days after the filing of notice of intention to prosecute a bill of exceptions?

Gen. Laws, 1909, cap. 298, § 17, reads as follows: "Any person or party who has taken exceptions in the superior court may prosecute a bill of exceptions to the supreme court by taking the following procedure:

"First. Within seven days after verdict or notice of decision, but if a motion for a new trial has been made, then within seven days after notice of decision thereon, he shall file in the office of the clerk of the superior court notice of his intention to prosecute a bill of exceptions to the supreme court together with a written request to the court stenographer for a transcript of so much of the testimony as may be required, and shall deposit with the clerk the estimated fees for transcribing such testimony as may be required. The filing of such notice and making of such deposit shall stay judgment or sentence until further order of the court;

"Second. Within such time as the court shall fix, not later than fifty days after filing notice of intention to prosecute a bill of exceptions, or within ten days after the expiration of such extended time as is provided by section four, chapter two hundred and seventy-eight for filing a transcript of the evidence, he shall file in the office of the clerk of the superior court his bill of exceptions, in which he shall state separately and clearly the exceptions relied upon; but no exception shall be stated therein to any ruling or decision upon any question of law theretofore certified to and decided by the supreme court in the cause. If exceptions shall be founded upon evidence and rulings thereon, or upon findings or decision of the court, or to the instructions of the court to the jury, or to a decision upon a motion for a new trial on the ground that the verdict is against the evidence or the weight of evidence or for newly

discovered evidence, he shall file in the office of the clerk, with his bill of exceptions, a transcript of the evidence and the rulings thereon, and of the instructions to the jury, or so much thereof as may be necessary for determination of the exceptions. Notice of the filing of such bill of exceptions shall not be required"; and cap. 278, sections 3 and 4 read as follows: "SEC. 3. Such stenographers shall report stenographically the proceedings in the trial of every action or proceeding, civil or criminal, in the superior court, and shall receive as compensation therefor a sum not exceeding six dollars per day, to be allowed by said court and paid by the general treasurer upon the order of the state auditor. Each stenographer shall also, upon the order of any justice of the court, transcribe his report to be filed with the papers in the case, and shall receive a reasonable compensation therefor, not exceeding ten cents for each one hundred words thereof, to be allowed by such justice and to be paid in the manner aforesaid. He shall also make a transcript of the whole or any part of such report upon the written request, filed with the clerk by either party to such action or proceeding, and when completed, and within the time limited by the court for filing the same, but not later than forty days from the date of such request, except as provided in section four of this chapter, shall immediately deliver the same to the party ordering it or to the attorney of record of said party, and for such service shall be paid a reasonable compensation, not exceeding ten cents for each one hundred words thereof, to be allowed by the court, and in case the transcript is used in subsequent proceedings in said cause the cost of the same may be allowed as a part of the costs.

"SEC. 4. In case of sickness or other disability of the court stenographer who made the report of the evidence and rulings, or for other causes, the superior court may, on motion therefor, and with or without notice, grant an extension of time for filing a transcript of the evidence and rulings beyond the period of forty days allowed by the preceding section."

The provisions of section 17 aforesaid are identical with those of C. P. A., § 490, with the exception of the concluding sentence concerning notice, and said sections 3 and 4 are respectively

the same as C. P. A., §§ 71 and 72, all of which were construed by this court in the case of *Baker v. Tyler*, 28 R. I. 152, wherein the process of prosecuting a bill of exceptions accompanied by a transcript of evidence is analyzed (p. 155) as follows:

"*First.* The party files in the clerk's office his notice and motion and request for the transcript of evidence (sections 71 and 490). Next, the court in answer to his motion fixes a time, not more than fifty days in the future, at which the party must file in the clerk's office his bill and transcript (section 490). By section 71 it is made the duty of the stenographer to deliver the transcript to the party or his attorney within the time fixed for the party to file it, but in no case later than forty days from the filing of the request. No act of the court is required to direct the stenographer. The statute defines his duty when the court has fixed the time within which the party must act.

"This is the ordinary and normal course of procedure contemplated by the statute, and there is no provision in any case by which the court can directly extend the time for filing the bill of exceptions beyond fifty days from the date of the notice. It may, however, often be impossible to procure the transcript for filing within the fifty days or the period fixed, and section 72 is designed to remedy this difficulty. It gives the court the power, for cause, to grant an extension of time for filing the transcript beyond the time originally fixed.

"When an extension of time for filing the transcript is given, the statute again, without action by the court, fixes the time for filing the bill of exceptions within ten days from the expiration of the extended time to file the transcript.

"In the case at bar the application of the party was duly made to the court, and thereupon the court, instead of fixing the time for filing the bill of exceptions and the transcript of evidence, or extending the time for filing the transcript, which would have automatically fixed the time for filing the bill of exceptions, filled out an order to stenographer to deliver the transcript to the party at a certain day. This order is not the order required by the statute, and is not a performance of the duty which the statute imposes upon the court."

- (1) It is perfectly clear that in the first instance the time to be fixed for filing the bill of exceptions and transcript of evidence must be the same, because the statute requires of the party that "he shall file in the office of the clerk, with his bill of exceptions, a transcript of the evidence and the rulings thereon, and of the instructions to the jury, or so much thereof as may be necessary for determination of the exceptions." They are to be filed together in the first instance, but in case of an extension of the time for filing the transcript, that is, a time beyond that originally fixed for the filing of the bill of exceptions, in such case of extension the bill of exceptions need not be filed at the same time as the transcript, but within ten days thereafter. Whatever confusion there may be in reference to the matter arises from the language used in section 4 aforesaid: "the superior court may grant an extension of time for filing a transcript of the evidence and rulings beyond the period of forty days allowed by the preceding section." The provisions of the preceding section (section 3), relative to the forty days, require the stenographer, upon written request by either party to make a transcript, and when the same is completed, and within the time limited by the court for filing the same, but not later than forty days from the date of such request, except as provided in section four of the chapter, to immediately deliver the same to the party ordering it or to his attorney of record. If, for example, under said section 17 the court should select the forty-ninth day after the filing of the notice of intention to prosecute a bill of exceptions as the time for the party to file the bill of exceptions, etc., that day would be the time limited by the court for filing the transcript, but under said section 3 the stenographer must make, complete, and deliver the transcript to the party or his attorney within forty days from the date of the written request filed with the clerk for the same. The stenographer is not required to file the transcript, that is not a duty cast upon him by the statute. Nor does the statute require any person to file the transcript ahead of the bill of exceptions within a period of fifty days after the filing of the notice of intention to prosecute a bill of excep-

tions. The benefit to be derived from this unnecessary filing is not readily perceptible. The party to whom it is delivered, or his attorney, needs the transcript to use in the preparation of his bill of exceptions. The adverse party has no need of it at that time, nor has the court. A requirement that the party shall file it the same day that he receives it, coupled with the express or implied permission that he may forthwith take it out again, bearing the file-mark of the clerk, would seem to be an unnecessary ceremony that would merely furnish proof of the time of the filing of the transcript by the party or his attorney, and incidental proof of the date of its delivery by the stenographer, who might easily protect himself and accomplish the same result by taking a receipt for the same. As the statute does not contain any provision for such antecedent filing of the transcript, it cannot be said to be a legal requirement. As the requirement was unnecessary, it can be disregarded without detriment to the rights of the parties.

As the plaintiff has complied with the statute in filing his bill of exceptions and transcript at the time and in the manner that he did, the motion to dismiss the same must be denied.

Page & Cushing and James F. McCartin, for plaintiff.

Thomas A. Carroll, Walter P. Suesman, for defendant.

SAMUEL PHILLIPS vs. THE RHODE ISLAND COMPANY.

DECEMBER 23, 1910.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Jurors. Affidavits of Jurors.*

The affidavit of a juror as to his own misconduct in taking an unauthorized view, is inadmissible to impeach the verdict.

On the ground of public policy, affidavits of jurors as to their own misconduct in or out of the jury room during a trial are inadmissible to impeach a verdict.

So also, an affidavit to the declaration of a juror impeaching a verdict not only contravenes the same rule but is also objectionable as hearsay evidence.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant, and overruled.

JOHNSON, J. This is an action of the case, brought by Samuel Phillips against The Rhode Island Company, to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant company in the operation of one of its street cars.

On April 21st, 1905, the plaintiff was driving a heavy wagon, loaded with oats, drawn by one horse, and was proceeding in an easterly direction from Promenade street across Canal street into Steeple street, in the city of Providence. Canal street running north and south intersects Steeple street running east and west, and Promenade street runs into Canal street nearly opposite Steeple street. The defendant company had a single track running through Steeple street into Canal street, which track, just before reaching the intersection with Canal street, curved in a southerly direction towards the corner of Steeple and Canal streets and extended across Canal street. At the time in question the plaintiff's wagon, going in an easterly direction, had just crossed the tracks in Canal street—fifteen or twenty feet westerly from the crosswalk at the foot of Steeple street—in order to proceed easterly on the southerly side of Steeple street. Near the crosswalk on Steeple street his wagon came in contact with a car of the defendant company which came down Steeple street towards Canal street, and the plaintiff was thrown to the ground and sustained the injuries complained of. The case was tried in the Superior Court with a jury on the 21st, 24th, and 25th days of January, 1910, and a verdict was rendered for the plaintiff in the sum of twenty-five hundred dollars. Thereupon the defendant moved for a new trial, alleging as grounds therefor:

First: That said verdict was contrary to the evidence and the weight thereof.

Second: That said verdict was contrary to the law.

Third: That the amount of damages awarded by said verdict is excessive.

Fourth: That certain members of the jury before whom said cause was tried were guilty of misconduct in this, that during the progress of said trial, and without the consent of the court,

without the knowledge and consent of the attorneys for the defendant, did take an unauthorized view of the premises where the accident occurred, concerning which said action was brought and prosecuted.

Fifth: That certain members of said jury during the progress of said trial did take an unauthorized view of the premises where the accident occurred, concerning which said action was brought and prosecuted, without the knowledge and consent of the defendant, and under such circumstances as to be calculated to lead a jury into error in the determination of said case.

Certain affidavits were filed by the defendant in support of said motion. The defendant's motion for a new trial was denied by the justice who presided at the trial, and the case is now before this court on the defendant's bill of exceptions.

The exceptions pressed by the defendant are to the denial of its motion for a new trial upon the several grounds stated therein, the other exceptions stated in the bill being waived.

From an examination of the evidence, which was conflicting, we are not able to say that the jury was not justified in returning a verdict for the plaintiff, or that the damages are excessive.

Upon the question of unauthorized views alleged to have been taken by two of the jurors, the affidavit of one juror was introduced stating that in coming from the restaurant where he had been to dinner, he paced the distance from the restaurant to the corner of Canal street, and measured in his mind the distance from the south curbing on Steeple street to the car track and thought it was not enough for a car and team to pass. An affidavit was also introduced stating that another juror had told the affiant that he, said juror, on Monday, January 24th, went alone to the place of the accident, to see how near his eye measurement would come to that stated in court; that he walked down Steeple street, on the south side of the street, and as he was walking along he thought in his own mind that the distance from Allen & Northup's restaurant to the corner of Canal street was about what was stated in court; that as he was walking towards the corner of Canal street he had a good view of the space from Steeple street south curbing to the car track,

and thought in his own mind that the distance was less than that stated in court; that he thought it would be a close squeeze for a car and team to pass each other when the car was on the curve; that he thought in his own mind that if the car was on the straight track on Steeple street that the team could have passed all right. This juror, by his affidavit on file, denied making the statements attributed to him by said affiant, and stated that the only view he had of the place of the accident was when the jury took a view, January 21, 1910.

The defendant relies on the case of *Garside v. Ladd Watch Case Co.*, 17 R. I. 691, as decisive of this case. In that case the plaintiff had been injured by falling into an opening in the landing of a stairway caused by a trap-door being left open. There was much conflicting testimony as to the structure, size, and exact location of the trap-door in question, there being testimony that the entire landing was a trap-door and that there was another trap-door within the landing; and on the other hand, testimony that there was no trap-door within the landing, but that the landing itself was on hinges and constituted the only trap-door there. After verdict for the plaintiff, the defendants petitioned for a new trial on the ground, *inter alia*, that certain members of the jury had during the trial taken an unauthorized view of the premises. In support of this motion the defendant offered in evidence a number of affidavits, made by persons in the employ of the defendant, to the effect that on the last day of the trial, four or five of the jurors engaged in said trial visited the place where the accident happened, and examined the landing and trap-door in question. The defendant also offered the affidavits of three of the jurors to the effect that the affiants and two other members of the jury visited the premises during the trial, of their own motion, and examined the trap-door in question. The court granted a new trial, but did not decide the question of the admissibility of the affidavits of the jurors, saying, p. 696: "But we need not decide in the present case whether the affidavits of the jurors, offered in evidence, as to what took place outside the jury-room are admissible, for there is sufficient proof of their misconduct without said affidavits."

There was no conflict of evidence in the case before us as to the distances referred to in the affidavit of the juror. The affidavit, if admissible, would not in our opinion be sufficient to justify a new trial. As, however, it was admitted by the court below, it becomes necessary to consider the question of its admissibility.

It is well settled in this State that the affidavits of jurymen as to what takes place in the juryroom are inadmissible to impeach their verdict. In *Tucker v. Town Council of South Kingstown*, 5 R. I. 558, 560, the court, speaking by Ames, C. J., said: "The affidavits of the jury-men as to what took place in the jury-room, or as to the grounds upon which they found their verdict, and which were read *de bene* at the hearing, must be rejected; a rule of policy, well settled both in England and in this country, excluding, for the security of verdicts, this mode of impeaching them."

The general rule that the affidavits of jurors as to their own misconduct during the trial are inadmissible to impeach their verdict is, we think, supported by the great weight of authority both in this country and in England. In *Owen v. Warburton*, 4 Bos. & Pull. 326, where the affidavit of a jurymen, that the verdict was decided by lot, was offered, Mansfield, Ch. J. (pp. 329-330), said: "We have conversed with the other judges upon this subject, and we are all of the opinion that the affidavit of a jurymen cannot be received. It is singular that almost the only evidence of which the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a jurymen might set aside a verdict by such evidence, it might sometimes happen that a jurymen, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him." In *State v. Freeman*, 5 Conn. 348, the court, by Hosmer, C. J. (p. 351), said: "In this state, it has been the practice to admit such testimony; but, said Ch. J. Swift (1 Dig. 775.),

‘In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury; for it is a great misdemeanor; and this is most unquestionably the correct principle; for otherwise, a juror, who should be disposed to set aside a verdict, would give information to the party for that purpose; if not so disposed, he could suppress the information; and, in that way, any of the jury could command the verdict.’

“The question before us regards a point of *practice*; and as this cannot have any consequences antecedent to this case, it is competent for the court to decide, unshackled by precedent, and change the rule, if justice requires it.” . . .

“If the question depended merely on equitable grounds, as relative to the immediate parties to the suit, the testimony in question, perhaps, ought to be received. But there are higher considerations to be resorted to. On a principle of policy, to give stability to the verdicts of jurors, and preserve the purity of trials by jury, the evidence ought not to be admitted. The reasons assigned by Sir James Mansfield, in *Owen v. Warburton* and by Ch. J. Swift, in his digest, are of great weight. The sanctioning of the testimony of one juror, relative to the misbehavior of the rest, would open a door to the exercise of the most pernicious arts, and hold before the friends of one of the parties, the most dangerous temptation. By this capacity of penetrating into the secrets of the jury-room, an inquisition over the jury, inconsistent with sound policy, as to the manner of their conduct, and even as to the grounds and reasons of their opinions, might ultimately be established, to the injury and dishonour of this mode of trial; imperfect, undoubtedly, but the best that can be devised. And under the guise of producing equity, there might be generated iniquity, in the conduct of the jurors, more to be deplored than the aberration from law, which, undoubtedly, sometimes takes place.

“The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations.”

In the cases cited *supra*, the affidavits of the jurors were

offered as to their misconduct in the juryroom. Where the affidavits of jurors have been offered as to their misconduct outside of the juryroom to impeach their verdict, the same rule of public policy has generally been applied by the courts. Thus in *Chadbourn v. Franklin*, 5 Gray, 312, where defendant moved for a new trial, and in support of the motion offered one of the jurors as a witness to show that on the Sunday intervening, while the trial was in progress, said juror went to the place where the collision occurred, and examined it for the purpose of informing himself upon the subject-matter of the trial, and the judge below ruled that the juror could not be permitted to testify, in support of this motion, to these acts tending to show his own misconduct, and the defendant excepted, the court, Shaw, C. J., said: "The modern practice has been uniform, not to entertain a motion to set aside a verdict on the ground of error, mistake, irregularity or misconduct of the jury, or of any of them, on the testimony of one or more jurors; and it rests, we think, on sound considerations of public policy." In *Rowe v. Canney*, 139 Mass. 41, 42, the court, by Morton, C. J., said: "The same considerations of public policy protect the communications of jurors with each other, whether in or out of the juryroom, during the pendency of the case on hearing before them." See also *Commonwealth v. White*, 147 Mass. 76, 80.

In *Sanitary District v. Cullerton*, 147 Ill. 385, the affidavits of three of the jurors were offered touching the conduct of others of the jury, and the bailiff in charge, tending to impeach the verdict. It was complained that after they had finished viewing the premises some of the jurors drank intoxicating liquor. The court, p. 390, said: "This court, in an unbroken line of decisions from the case of *Forrester v. Guard*, Breese, 44, is committed to the doctrine that the affidavits of jurors can not be received for the purpose of showing cause for setting aside the verdict. There may be *dicta* in some of the cases intimating a contrary rule, but in every case where the question has been before the court, and determined, the principle has been adhered to;" and again, p. 391: "In trials in the courts of justice not only should there be absolutely nothing improper

permitted, but, to the end that respect for the administration of the law may be maintained, the very appearance of evil should be avoided, and the courts are clothed with ample power to punish, appropriately, the misconduct of jurors, and of others in their presence, and no court ought to hesitate to impose adequate penalties and set aside verdicts where there has been conduct by which the jury may have been improperly influenced, or the verdict has been the result of improper conduct on the part of jurors. But to permit the affidavits of jurors to be heard, showing that the verdict to which they, on their oaths, consented, was the result of improper influence or corrupt practice, 'is condemned by the clearest principles of justice and public policy.' But few verdicts in important cases would be permitted to stand. Litigants, in whose favor verdicts might be rendered, would be placed at the mercy of corrupt jurors. Litigation would be increased, the widest door thrown open to fraud and perjury, and the administration of the law brought into contempt."

In *Heldmaier v. Rehor*, 90 Ill. App. 96, the court, at p. 98, said: "Upon motion for a new trial, affidavits were presented, stating that two of the jurors admitted after the trial, that, during its progress, they examined a stone-wagon to ascertain whether the boy could have been rolled under such a wagon as appellee's testimony tended to show he had been. This was a controverted point. The wagon said to have been so examined was not that by which the injury was inflicted. It is claimed that by reason of such alleged misconduct of the jurors the verdict should have been set aside. The affidavits purport to show that the jurors expressed themselves after the verdict, as satisfied, from such examination, that there was ample room for the boy's body under the platform of such a wagon. These affidavits are not by the jurors themselves, but by the defendant and others. It is settled law in this state that the affidavits of jurors can not be received for the purpose of showing cause for setting aside a verdict. *Sanitary District v. Cullerton*, 147 Ill. 385, and cases there cited. If affidavits of jurors themselves can not be so received, it is apparent that affidavits

setting forth statements made by jurors after the close of a trial, must be equally inadmissible. If these affidavits could be considered and were to be accepted as stating facts, the judgment of the two jurors in question would appear to have been influenced by incompetent evidence which could not have been admitted at the trial. The jury are required to rely on the evidence introduced in court and are not permitted to obtain it outside. But to permit the introduction of affidavits to impeach the conduct of jurors upon hearsay statements said to have been made by them, or even upon their own affidavits, after their connection with the case has terminated and they have been discharged, would open the door to endless attacks upon verdicts, invite fraud, and place litigants at the mercy of jurors dissatisfied, or open to corrupting influences."

In *Clark v. Famous Shoe &c. Co.*, 16 Mo. App. 463, the court, p. 467, said: "We have also examined the defendant's complaint founded on the alleged misconduct of a juror. That misconduct consisted, as the record shows, of the juror going to the building where the accident occurred, after the trial began, inspecting it and making some measurements, for the purpose, as he says, of verifying the correctness of the plats offered in evidence, and of seeing whether the place was dangerous. The general rule undoubtedly is that the triers of the fact should derive their information from the evidence offered on the trial of the cause and the law as given to them by the court. They are sworn to do so and are guilty of misconduct if they violate their oaths in that regard. If the misconduct of the juror in this case would have been substantiated by anything beyond his own testimony, we would have felt at liberty to consider it, and determine whether it was such as to deprive the plaintiffs who were wholly innocent, of the benefit of their verdict. But the only evidence found in the record of the alleged misconduct of the juror, is his own testimony given in court upon the hearing of the motion for new trial. This testimony we are not at liberty to consider, nor should the trial court have considered it, because under the rule now prevailing in this state, the testimony of a juror tending to impeach his verdict, can not be

received, and it seems to make no difference in that regard, whether the alleged misconduct took place in or out of the jury-room."

In *Herring v. Wabash R. Co.*, 80 Mo. App. 562, the court, p. 568, said: "It is next insisted that the court erred in refusing to permit defendant to show by one of the jurors that during a recess in the trial he and another juror went to the place of the accident and viewed the scene to inform themselves upon the issues on trial. While, if true, such conduct on the part of the jurors was improper, there was no error in excluding proof thereof by the testimony of one of the jurors. The rule in this state is, that no juror will be permitted to impeach his verdict, either directly by his affidavit or evidence, or indirectly by the affidavits of others, as to statements made to them by the juror after the verdict was rendered."

In *Clum v. Smith*, 5 Hill, 560, where it was alleged that the foreman of the jury separated from his fellows after the case had been submitted and the jury had gone to their room, in order to learn from persons not of the jury the amount of damages which ought to be found in order to carry costs, obtained the information that fifty dollars was sufficient, which he communicated to the jury upon his return, whereupon a verdict for that amount was rendered for the plaintiff, the court said: "These facts are established by the affidavits of three jurors. The only other affidavit, that of the assistant clerk, comes short of making out any irregularity in the conduct of the foreman, unless we receive as evidence the declarations of the latter made subsequent to the time of the alleged transaction. This we cannot do. . . . It therefore becomes unnecessary to inquire whether the misconduct imputed to the foreman forms a ground for setting the verdict aside; for it seems to be settled that jurors are not competent witnesses in support of such a motion as the present. That the affidavits of jurors are not receivable to impeach their verdict, was admitted on the argument; but it was said the rule meant impeachment for mistake or error in respect to the merits, not for irregularity or misconduct. It seems, however, to cover both grounds. The case of *Jackson v. Williamson*,

(2 T. R. 281,) is a strong one upon the question of mistake, while *Vaise v. Delaval*, (1 T. R. 11,) *Owen v. Warburton*, (4 Bos. & Pull. 326,) and *Dana v. Tucker*, (4 John. 487,) are all in point that jurors cannot be heard as to their own misconduct or that of their fellows." The court then quotes the remarks of Mansfield, Ch. J., in *Owen v. Warburton*, which we have quoted *supra*, and says: "Taking this to be the principle, it is equally applicable to all sorts of misconduct." See also *Williams v. Montgomery*, 60 N. Y. 648.

In *Deacon v. Shreve*, 22 N. J. L. 176, the court said, at page 182: "The principle is now well settled, that generally the affidavits of jurors shall not be received as to what took place in the jury-room, or elsewhere, to show misbehavior, or on the delivery of the verdict to show mistake, for the purpose of correcting or destroying the verdict, though it seems their affidavits are admissible for the purpose of exculpation. The rule stands on the ground of public policy, courts being unwilling to permit a dissatisfied juror by such means to destroy a verdict to which he had given a public assent."

In *Downer v. Baxter*, 30 Vt. 467, after the case had been given to the jury, the officer in charge allowed the jury to separate, and they went to their respective boarding-houses for dinner, returning thence to the juryroom and resuming the consideration of the case. The affidavits of all the jurors were read, stating that after they were impanelled to try the cause they had no conversation with any one touching it, except among themselves. The court, p. 475, said: "An objection was taken to the competency of the affidavits of the jurors and their admissibility raises a legal question which we are called upon to decide. We think the true rule is, that the affidavits of jurors may be read to exculpate themselves and sustain their verdict, but not to impeach it. In this case they were offered to show that the jurors had no conversation with others, nor heard any in relation to the cause."

In *Siemens v. Oakland, etc., Electric R. Co.*, 134 Cal. 494, where an unauthorized view was alleged, the court said, p. 497: "However the rule may be in other states, it is settled in

this beyond controversy that a juror may impeach his own verdict upon no other ground than that designated by the code (citing cases). It is sought by respondent, upon this motion, to make a distinction between the misconduct of a juror before retiring, and the misconduct of a juror during retirement; but to this it may be said, in the language of *Boyce v. California Stage Co.*, 25 Cal. 463: 'In conclusion, upon this branch of the case we may add that a line of judicial decisions which struggles to multiply exceptions to a plain and simple rule, founded on considerations of the wisest policy, is not to be favored; on the contrary, the struggle should be to bring every case within the rule, lest the rule itself become shadowy, and in time wholly disappear in a multitude of exceptions.'" See also *Pickens v. Boom Co.*, 58 W. Va. 19; 29 Cyc. 982, 983 and cases cited; Thompson and Merriam on Juries, § 440 and cases cited.

In some States affidavits of jurors as to their own misconduct outside the juryroom during the trial are admitted to impeach their verdict. *Pierce v. Brennan*, 83 Minn. 422; *Peppercorn v. Black River Falls*, 89 Wis. 38; *Roller v. Bachman*, 5 Lea. 153. In Iowa it has been held that affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the juryroom, which does not essentially inhere in the verdict itself. *Wright v. I. & M. Tel. Co.*, 20 Iowa, 195. This was a case of misconduct in the juryroom. This rule has been followed in Kansas,—*Perry v. Bailey*, 12 Kan. 539. We are not, however, convinced by the reasoning of these cases. We are of the opinion that the affidavits of jurors as to their own misconduct in or out of the juryroom during the trial are inadmissible to impeach their verdict. The objection on the ground of public policy is just as strong in the one case as in the other. The affidavit of the juror in this case was inadmissible as to his own misconduct in taking an unauthorized view, to impeach the verdict, and therefore can not be considered. An affidavit to the declaration of a juror impeaching the verdict, besides contravening the same rule of policy, is condemned by the ordinary rule of evidence, excluding hearsay testimony.

The defendant's exceptions are overruled, and the case is remitted to the Superior Court with direction to enter judgment upon the verdict.

Waterman, Curran & Hunt, for plaintiff.

Joseph C. Sweeney, Alonzo R. Williams, for defendant.

NINA WALKER v. JAMES W. G. WALKER.

DECEMBER 30, 1910.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Jurisdiction. Motion to Dismiss Complaint. Divorce.*

A motion to dismiss a petition for divorce for want of jurisdiction is properly heard and determined at the earliest moment.

Want of jurisdiction can not be waived nor cured by general appearance.

Upon hearing of a motion to dismiss a petition for divorce for want of jurisdiction, evidence touching the charges of petitioner was properly excluded.

(2) *Divorce. Jurisdiction. Domicile and Residence.*

Where it appeared that the domicile and residence of a respondent in proceedings for divorce from bed and board was outside the State, and that petitioner did not attempt to gain a residence and domicile separate and apart from respondent until after she signed and made oath to the petition, the court was without jurisdiction to entertain the petition.

The acquirement of residence or domicile must precede the preferment of the petition; therefore a petition for divorce can not be presented with the expectation of thereafter acquiring the domicile or residence.

Semble; that in a proper case, one of urgent necessity, a wife might become a domiciled inhabitant of this State by residing here separate and apart from her husband for a fractional part of a day, for the purpose of becoming a petitioner for divorce from bed and board.

DIVORCE. Heard on exceptions of petitioner, and overruled.

DUBOIS, C. J. This is a proceeding for divorce wherein the petition was sworn to on the sixteenth day of October, 1909, and filed in the clerk's office of the Superior Court on the nineteenth day of said month. Service was made upon the respondent, on the twentieth day of the same month. The petition reads as follows:

"STATE OF RHODE ISLAND,

"NEWPORT, SC.

"To the Superior Court, next to be holden at Newport, in the county of Newport and State of Rhode Island, on the third Monday of November, A. D. 1909.

"Respectfully represents, your petitioner, Nina Walker, of the said city and county of Newport and State of Rhode Island: that she resides in said county and has been a domiciled inhabitant of said State, and has resided therein for upwards of a year and a half next before the preferring of this petition, and is now a domiciled inhabitant of said State:

"That she was married to James W. G. Walker, her present husband, now residing in said city of Newport, on the 24th day of February, A. D. 1897, and hath ever since on her part demeaned herself as a faithful wife and hath performed all the obligations of the marriage covenant:

"But that the said James W. G. Walker hath violated the same in this: that he hath been guilty of adultery and hath been guilty of extreme cruelty to your petitioner, his said wife, and of other gross misbehavior, and wickedness in violation of his marriage covenant:

"Wherefore your petitioner prays that a decree of this court may be made, divorcing her from the bed, board, and future cohabitation with said James W. G. Walker and until the parties shall be reconciled:

"And your petitioner further shows that there have been born of said marriage, children, as follows: Elizabeth G. Walker, born November 30, 1897; John G. Walker, born October 2, 1899; R. Serrill W. Walker, born November 16, 1900; and Herbert W. Walker, born December 18, 1901, now in the care and custody of your petitioner and as it is for the best interest of said minor children that they should remain with your petitioner, she prays that she may be awarded the custody of the said children:

"That the said respondent, James W. G. Walker, is possessed of an ample salary, and income from certain funds and has property: Your petitioner prays that she may be awarded

sufficient alimony and support for herself and her said children to be paid her by said respondent, or charged on his property in such manner as the court may order:

"And your petitioner as in duty bound will ever pray;

"NINA WALKER.

"Subscribed and sworn to before me at said Newport, in said county of Newport and State of Rhode Island, this 16th day of October, A. D. 1909.

"Witness my hand and notarial seal,

WILLIAM PAINE SHEFFIELD,
"Notary Public."

On the fifteenth day of December, 1909, in compliance with the order of the Superior Court, the petitioner filed a bill of particulars relating to the misconduct of the respondent and on the twenty-eighth day of said December, the respondent filed the following motion to dismiss the petition:

"James W. G. Walker, the above named defendant, respectfully represents to this honorable court that on or about the 29th day of July, A. D. 1898, he was and for some years prior thereto had been a domiciled inhabitant of the city of Washington, in the District of Columbia; that on or about the said 29th day of July, A. D. 1898, he, being then a domiciled inhabitant of the city of Washington, as aforesaid, was appointed to a position in the United States Navy and has ever since been in the Naval service of the United States of America; that since his said appointment, he has from time to time sojourned at different places in the United States and elsewhere as he was assigned thereto by the Naval authorities of the United States, but has never since said appointment, changed his said domicile or acquired any domicile other than said Washington; that his present domicile is said city of Washington, and that he is not now and never has been domiciled in the State of Rhode Island; that his wife, Nina Walker, the petitioner in the above entitled cause, has since her marriage, resided with him, and has never, since said marriage, up to the time of the filing of the petition in this case, acquired a separate domicile; that

she was living with him as his wife on the government reservation commonly known as 'The Naval Training Station' on the day on which the petition in the above entitled cause was executed and sworn to by her and was so residing with him as his wife on said reservation on the day on which said petition was filed in this honorable court; that neither this defendant nor his wife, the said petitioner, had any *bona fide* domicile within the State of Rhode Island at the time of the preferring of the petition in this case; and this honorable court is without jurisdiction to proceed to pass upon the subject-matter of said petition or to grant the relief therein and thereby prayed.

"Wherefore, this defendant respectfully moves that this honorable court dismiss said petition for want of jurisdiction.

"JAMES W. G. WALKER."

On the third day of January, 1910, the court heard said motion, and on the seventh day of February, 1910, entered the following decree:

"The above entitled cause came on to be heard on the defendant's motion that said cause be dismissed for want of jurisdiction, and after a full hearing of the evidence offered for and in behalf of said motion and arguments of counsel for the parties to said cause, it is hereby ordered, adjudged, and decreed that the said motion of said defendant be and the same hereby is granted, and that the petition of the said Nina Walker be and the same hereby is dismissed."

To this ruling the petitioner duly excepted, and filed her bill of exceptions setting forth that:

"This was a petition for divorce filed by Nina Walker against James W. G. Walker, in the Superior Court on October 1st, 1909, and the same was assigned for trial January 3rd. On December 28, 1909, the respondent filed a motion to dismiss the proceedings on the ground of lack of jurisdiction (for further certainty as to this, reference is had to the motion on file in said cause), and on January 31, 1910, the court, against the objection of the respondent, proceeded to hear said motion, and on February 7th, 1910, the court entered a decree granting said

motion and dismissing the petition. The petitioner within seven days thereafter, filed her exception to said decree and also her notice of intention to prosecute a bill of exceptions and, herewith, states her bill of exceptions, as follows:—

“1. Because the court erred in entertaining said motion, and to which ruling the petitioner hereby especially excepts.

“2. Because the court erred in entering said decree dismissing said petition.

“3. Because the court erred in hearing said motion to dismiss without hearing the merits of said cause.

“4. Because said decree was against the law.

“5. Because said decree was against the evidence.

“6. Because said decree was against the law and the evidence and ought to be reversed.”

The foregoing exceptions were duly allowed, and the case is now before this court for consideration upon the merits of said exceptions.

- (1) The court did not err in entertaining the motion to dismiss the petition for want of jurisdiction. Such a motion must be entertained at the earliest possible moment, because it is of vital importance to ascertain whether the court has power to proceed further in the matter. It needs no citation of authorities to convince even the most sceptical that a question lying so close to the root of the matter must be determined forthwith. Moreover, it is something that can not be waived, nor can it be cured by a general appearance.

Whether the court erred in hearing the motion to dismiss without considering the merits of the cause depends somewhat upon the definition of the word “merits” in the sentence. Assuming that it means the petitioner’s charges of the respondent’s misconduct, contained in her petition for divorce, we are of the opinion that the court did not err in excluding evidence touching the same in the hearing upon the motion to dismiss for want of jurisdiction. Proof of the truth of the charges could not confer jurisdiction upon the Superior Court if that was lacking, and, in the investigation of its jurisdiction to hear the charges, the truth or falsity of the very charges is not involved.

But even if the court had assumed that they were true, as they were sworn to and the defendant had not then denied them, they could not have been of any assistance upon the point in issue. The only question involved was that of jurisdiction. What had the petitioner alleged, and what did she prove concerning (2) the same? Her allegations in that particular relate to the place of her residence and domicile and to that of her husband. The statute governing the subject is Gen. Laws, 1909, cap. 247, § 8, which reads as follows: "SEC. 8. Divorce from bed, board, and future cohabitation, until the parties be reconciled, may be granted for any of the causes for which by law a divorce from the bond of marriage may be decreed, and for such other causes as may seem to require the same: *Provided*, the petitioner shall be a domiciled inhabitant of this state and shall have resided in this state such length of time as to the court in its discretion shall seem to warrant the exercise of the powers in this section conferred. In case of such divorce the court may assign to the petitioner a separate maintenance out of the estate or property of the husband or wife, as the case may be, in such manner and of such amount as it may think necessary or proper." The jurisdictional requirement is contained in the foregoing proviso. Section 9 of said chapter provides that "every petition shall be signed and sworn to by the petitioner," as it was in the present instance. Every person thus signing and swearing to the truth of a petition thereby then and there becomes *ipso facto* the petitioner. The petition in the case at bar was signed and sworn to October 16th, 1909. The jurisdiction of the Superior Court in the case depends upon the status of the petitioner October 16th, 1909. The petitioner testified that she did not leave her husband until October 19th, 1909, and did not attempt to gain a residence separate and apart from his until that day. From the time of their marriage and up to October 19th, aforesaid, her residence and domicile was merged in that of her husband. There was a preponderance of evidence in support of the allegations in the respondent's motion to dismiss. As it appears that the domicile and residence of the respondent up to the time of the hearing was Washington,

D. C., and that the petitioner did not attempt to gain a residence and domicile separate and apart from her said husband until after she signed and made oath to the truth of her petition for divorce, it is clear that the Superior Court was without jurisdiction in the premises, and therefore had no alternative other than to grant the respondent's motion to dismiss the petition. We do not mean to imply or to be understood as saying that in a proper case, one of urgent necessity, a wife could not become a domiciled inhabitant of this State by residing therein, separate and apart from her husband, one day or even a fractional part thereof, for the purpose of becoming a petitioner for divorce from bed and board under the statute aforesaid. What we do say is that the acquirement of residence or domicile must precede the preferment of the petition, and that one can not present a petition for divorce with the expectation or hope of thereafter acquiring such a residence or domicile.

The petitioner's exceptions are therefore overruled, and the case is remitted to the Superior Court therein to stand dismissed in accordance with the decree of said court entered February 7, 1910.

Sheffield, Levy & Harvey, for petitioner.

Clark Burdick, Walter H. Barney, for respondent.

DONALD CHURCHILL vs. JOHN C. HEBDEN *et al.*

DECEMBER 30, 1910.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Evidence. Books of Account. Credit Given, to Whom.*

In an action upon book account, plaintiff offered in evidence books of account kept in regular course of business, for the purpose of proving not only the performance of the services and the charge therefor, but also for the purpose of showing to whom plaintiff had extended credit. Defendant had admitted the performance of the work, and the amount of the charge. The evidence was excluded:—

Held, that, in view of the admission, the only purpose in offering the books was to show that the charge was made against defendant, and books of account

are inadmissible to show to whom credit was given when that fact is in issue.

(2) *Evidence. Res Inter Alios Acta.*

Upon the issue as to whether defendant had employed or agreed to pay plaintiff for his services, rendered to the brother of defendant; evidence as to other payments made by defendant to other parties in connection with the same transaction was properly excluded.

(3) *Contracts. Implied Promise to Pay for Services Performed for Third Party.*

In an action to recover for professional services rendered to brother of defendant, evidence considered, and held not to sustain any implied promise on the part of defendant to pay therefor.

ASSUMPSIT. Heard on exceptions of plaintiff, and overruled.

DUBOIS, C. J. This is an action of assumpsit brought by the plaintiff, a physician and surgeon, to recover the sum of five hundred dollars for "professional services in performing operation for appendicitis on William D. Hebden, June 25, 1908." The defendants named in the writ are John C. Hebden, of Providence, and William D. Hebden, of Pawtucket, in this State. The writ was dated December, 1908, and was made returnable to the Superior Court on the sixth day of January, 1909. On the eighth day of January, 1909, the plaintiff filed his declaration in said case against John C. Hebden, aforesaid, and on the same day entered in said court a discontinuance of said action as against said William D. Hebden. February 11, 1910, the death of the plaintiff was suggested, and an appearance was entered for the executrix of his will. Upon jury trial, at the conclusion of the testimony, on motion of the defendant, the justice presiding directed a verdict for the defendant upon the ground that there was no evidence that the defendant had promised the plaintiff to pay him for the services for which he had brought suit; and further, that there was no evidence from which such a promise can be inferred. In other words, that the evidence failed to prove either an express or implied promise of the defendant to the plaintiff. The plaintiff thereupon took an exception to said decision and prosecuted the same, and other exceptions taken during the

trial, in the following bill of exceptions: "Now comes the plaintiff in the above entitled case and shows that said case was tried in the Superior Court on March 4, 1910, before Mr. Justice Lee and a jury, and that at the conclusion of the testimony, on motion of the defendant, and by direction of the court, a verdict was rendered for the defendant.

"That thereafterwards within seven days after said verdict the said plaintiff filed notice of intention to prosecute a bill of exceptions.

"That certain exceptions were taken during the trial and in the proceedings in said case as follows:

"1. To the ruling of said justice at the trial of said case in refusing to admit the books of the plaintiff in proof of the declaration upon book account and under the plea of the general issue, to which exception was duly taken as shown upon page 9 of the transcript of testimony.

"2. To the ruling of said justice in refusing to admit in evidence said book account after further foundation had been laid for its admission, to which exception was duly taken, as is shown upon page 51 of said transcript.

"3. To the ruling of said justice in refusing to admit evidence that the defendant paid for the services of other persons who performed services in connection with the same transaction as that in which the plaintiff was suing for his services, to which exception was duly taken, as shown on page 35 of said transcript.

"4. To the ruling of said justice at said trial in refusing to admit upon cross-examination of the defendant a question as to whether he engaged the hospital in which the operation upon his brother was performed, to which exception was duly taken, as is shown on page 62 of said transcript.

"5. To the ruling of said justice in refusing to admit in evidence a question in cross examination of the defendant as to whether he paid the hospital bill, to which exception was duly taken as shown on page 64 of said transcript.

"6. To the direction of the verdict for the defendant upon the defendant's motion therefor at the conclusion of the testi-

mony, to which exception was duly taken, as shown on page 93 of said transcript.

"And the plaintiff avers that all of said rulings and the direction of said verdict were erroneous, and that said errors entitle the plaintiff to a new trial or to judgment.

"Wherefore the plaintiff within the time limited tenders this bill of exceptions and prays that the same may be duly allowed in accordance with law."

The case is now before this court for consideration of the validity of the exceptions therein contained.

- (1) The first and second exceptions relate to rulings of the trial judge refusing to admit the books of account of the plaintiff, kept by him in the regular course of business, for the purpose of proving not only the performance of the services and the charge made therefor, but also for the purpose of showing to whom the plaintiff had extended credit. So far as proving that the services were performed and the value placed thereon by the plaintiff, the books were unnecessary, for the following admission was made in behalf of the defendant in open court, and in the presence of the jury during the trial of the case. In the course of the discussion relative to the admission or rejection of the plaintiff's books of account as evidence, the following colloquy occurred between the court and counsel for the defendant: "THE COURT: Do I understand that you do not deny that this work was performed? MR. BROWN: No denial that the work was performed, and no denial that the charge was five hundred dollars. The sole question is whether this defendant was responsible for services performed on his brother, whether he agreed to assume that liability." In view of the admission, the only purpose the plaintiff could have had in offering the books of account in evidence thereafter was to show thereby that he had made the charge against the defendant. The very point in issue was whether the defendant had employed the plaintiff or had agreed to pay for his services rendered to the brother of the defendant. The jury had to pass upon that issue, and the burden of proof was upon the plaintiff to satisfy the jury, by a fair preponderance of

the evidence, of his employment by the defendant. To show the entry upon the books would merely show the deduction reached by the plaintiff through his sources of information as to the circumstances surrounding the transaction. Those circumstances were to be submitted to the jury, and they were entitled to consider them without knowledge of the inferences drawn therefrom by either party to the transaction. The parties necessarily took an interested view of the situation, the jury should consider the same without prejudice. The rule is well stated as follows: "Books of account are inadmissible to show to whom credit was given when that fact is in issue. Thus they are not evidence to charge a defendant with goods delivered to a third person or for services performed for a third person, on the adverse party's order." 17 Cvc. p. 379 bb. and cases cited. There is no merit in the plaintiff's first or second exception, and the same are therefore overruled.

- (2) The plaintiff's third, fourth, and fifth exceptions were taken to rulings excluding evidence as to other contracts or payments made by the defendant, as for example, who paid the nurse for her services rendered William D. Hebden, or whether the defendant engaged or paid for the hospital wherein the operation was performed by the plaintiff. These were *res inter alios acta*, and were properly excluded. The plaintiff therefore takes nothing by these exceptions. .
- (3) The last exception has reference to the court's direction of a verdict for the defendant at the conclusion of the testimony. The direction was in the following language: "THE COURT: Gentlemen, this is an action brought by Harriet P. Churchill, executrix of the last will and testament of Donald Churchill, against John C. Hebden, to recover for the sum of five hundred dollars which the plaintiff alleges is due from the said John C. Hebden to the estate of Donald Churchill, deceased. Now the plaintiff claims that on the 25th day of June, 1908, that John C. Hebden requested one Dr. Terry to employ a physician to operate upon his brother, William D. Hebden, who was then lying sick in the city of Pawtucket; that the brother made arrangements to have William D. Hebden removed to the hos-

pital, the Jane Brown Memorial Hospital on Benefit Street, Providence; that he was removed to that hospital and was operated upon by Dr. Donald Churchill.

"Now in order that the plaintiff may recover in this action she must prove to you, by fair preponderance of the testimony, first, that John C. Hebden requested this work, and second, that he promised to pay it, or she must prove some circumstance by which a promise can be implied from the request. John C. Hebden is the brother of William D. Hebden. There is absolutely no testimony of an express promise to pay, so that if the plaintiff is entitled to recover in this case it must be by virtue of certain circumstances by which the law would imply a promise on his part to pay for those services. For instance, if a husband calls a physician to attend his wife, being under obligation to take care of his wife, the law would imply a promise to pay for those services, even though he made no promise. If a father calls a physician to attend his minor son, he being under obligation to take care of that minor son, the law would imply a promise to pay for those services. But where a mere stranger—and brothers are strangers in that respect—where a mere stranger calls upon a physician to attend a third person, whom the man calling the physician is under no obligation to take care of, then the law will not imply any promise to pay for the services rendered that third person, for they are of no benefit to the person making the request. In other words, the physician must look to the one for whose benefit those services are performed.

"Those are the facts in this case, and it is my duty to direct you to return a verdict for the defendant, and I so direct you."

A careful consideration of the transcript of testimony taken in the case fails to disclose any error on the part of the trial judge in the direction of the verdict. On the contrary, it reveals a state of facts fully justifying the charge given in the language above quoted; among other things it appears that the patient was a man twenty-nine or thirty years of age *sui juris* and keeping house in Pawtucket with his wife and three children, while the defendant was a resident of Providence;

that Dr. Terry testified that he telephoned to Dr. Churchill and made arrangements for the operation, but did not remember that anything was said about the fees or who should pay them; that William D. Hebden, the patient, testified in relation thereto as follows: "Dr. Terry entered my room with my brother, Mr. John C. Hebden, and he said I had appendicitis, and he said the only way to do was to go and be operated on. I told him I didn't want to do that, I didn't like the idea of being operated on anyway; he told me it was the only way to do to get rid of the trouble. I told him I didn't want to go. He talked it over, he and my brother, and I asked him what the cost would be, and he says, 'Never mind about the cost. It is a little matter that can be fixed up afterwards.' I said, 'I would like to know, for I am the man that has got to pay this bill, and I would like to know before we decide whether or not I will go.' He says, 'Don't let that bother you. We can fix that satisfactorily,' and he sat there talking and says, 'Well, Mr. Hebden, I am going downstairs. You think it over and decide to go into the hospital.' I says, 'I would like to know definitely what it is going to cost.' 'Oh,' he says, 'two hundred dollars, possibly two hundred and fifty dollars, all said and told.' I says, 'Dr. Terry, I don't want to go and be operated on anyway. I don't like the idea and I don't think I am sick enough to be operated on.' He sat talking a few minutes and then went downstairs, and he sat downstairs fully a half or three-quarters of an hour, and in the meantime Mr. John C. Hebden and my wife and mother came up and we were talking, and we decided I would go. Dr. Terry, as I understand it, telephoned to Dr. Churchill, and Mr. John C. Hebden telephoned and made arrangements for the hospital."

In view of all the circumstances of the case we are of the opinion that the verdict was properly directed.

The plaintiff's exceptions are therefore overruled, and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Everard Appleton, Mumford, Huddy and Emerson, George H. Huddy, Jr., for plaintiff.

William J. Brown, for defendant.

PETITION OF NEWTON ADAMS, *Admr., et al.*, FOR AN OPINION.

JANUARY 11, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Wills. Equitable Conversion.*

Testamentary devise as follows:—"I give, devise and bequeath to my executor, all my real and personal estate of every kind in trust to receive the rents and profits of my real estate until it shall be sold and to sell my real and personal estate and convert the same into money as soon as may conveniently be done after my decease, and on such terms as he may deem proper and to dispose of said rents and profits and of the proceeds of the sale of my real and personal estate in the manner hereinafter directed;" *i. e.* "to divide all the rest, residue and remainder of my real and personal estate or the proceeds thereof into three equal shares and to pay over one of such shares to A. if he shall have attained the age of 25 years at the time of my decease" and with other similar provisions for the payment of the other two shares to B. and C. if they had attained such age at that time; with directions in case any of the beneficiaries should be living and under the age of 25 years at death of testatrix, that the executor should hold such share in trust until the attaining of that age.

"I appoint my nephew X. the executor of and trustee under this will." X. having deceased, Y. was appointed administrator with the will annexed and substituted trustee:—

On special case stated for construction of will:—

Held, that:—the express intention of testatrix was that all the residuary real estate should be converted by executor into personal property, and that the beneficiaries should receive personal and not real estate.

(2) *Equitable Conversion.*

An absolute and not discretionary direction to an executor to sell real estate and distribute the proceeds of the sale as money or invest them in personal property works an out and out conversion of the real estate into personalty, so that the interests of the beneficiaries must be treated for all purposes in equity as personal and not real property from the date of testator's death.

(3) *Discretion in Executor. Equitable Conversion.*

When a testator directs his executor to sell his real estate, a discretion given the executor as to the time, manner, or terms of sale will not prevent an equitable conversion from taking place.

(4) *Same.*

Held, further, that, in this case, the duty of the executor to sell was absolute, and not discretionary, since the power given him was in trust and its exercise was compulsory.

(5) *Wills. Construction.*

Held, further, that the legal title to the real estate in question was given to the executor, and the residuary legatees got no right, title, or interest in it, legal or equitable, which could be conveyed by them or upon which attachment could be levied.

(6) *Powers of Sale Given Executor Vest in Administrator.*

The powers of sale conferred upon the executor by the will vested under Gen. Laws, 1909, cap. 312, § 26, in the administrator with the will annexed upon his appointment and qualification as such.

(7) *Wills. Executors. Trusts.*

Held, further, that, while it might be necessary for the executor to hold some of the proceeds of the sale in trust for a time, this did not alter the nature of the power of sale, and the administrator must exercise the power in his capacity as administrator having no active duties as trustee until he had set aside the share of C., who was under 25 years of age, which he should hold in trust for her.

(8) *Wills. Sale by Executor Under Power.*

Held, further, that the administrator might sell and convey the property so as to convey all the right, title, and interest of testatrix free and clear of any incumbrances attempted to be placed upon it since the decease of testatrix, either by way of attachment in suits against the beneficiaries or by way of deed from one of such beneficiaries.

PARKHURST, J. This is an original proceeding in this court, under the provisions of Gen. Laws, 1909, chapter 289, § 20, wherein parties having adversary interests in the construction of a will concur in stating certain questions in the form of a special case, by way of a petition for the construction of the will of Sophia E. Blatchford in so far as it concerns the title to certain real property in the city of Newport, devised in and by said will in clause sixteen thereof, which is as follows: "I give, devise and bequeath to my executor all my real and personal estate of every kind whatsoever and wheresoever situated and whether acquired before or after the execution of this will, with the exception of such personal property as is hereinbefore specifically bequeathed by clauses second to fourteenth inclusive of this will, in trust to receive the rents and profits of my real estate until it shall be sold, and to sell my real and personal estate and convert the same into money as soon as may conveniently be done after my decease, and on such terms as he may deem proper, and to dispose of said rents and profits and

of the proceeds of the sale of my real and personal estate in the manner hereinafter directed, with power to my executor to lease or mortgage any of my real estate, should he deem it necessary to do so for the purpose of carrying out the provisions of this my will; and with reference to any mortgage made on any of my real property in Newport, Rhode Island, it is my will that any and every mortgage made hereunder on said real property may contain such clause for sale and insurance, and such other clauses as are customary in mortgages taken by the savings banks of Newport, Rhode Island."

The seventeenth clause of the will directs the "executor to divide all the rest, residue and remainder of my real and personal estate, or the proceeds thereof, into three equal shares, and to pay over one of such shares to Francis Hunter Potter, if he shall have attained the age of twenty-five years at the time of my decease;" and by the eighteenth clause the executor is directed to pay over another of the shares to Philip Barton Key Potter, if he shall have attained the age of twenty-five years at that time; and by the nineteenth clause the executor is directed to pay over another of the shares to Alice Key Potter (now Alice Potter Adams, wife of Newton Adams), if she shall have attained the age of twenty-five years at that time; with certain provisions as to the disposal of the respective shares in the case of the death of one or more of these three legatees before the death of the testatrix or before attaining the age of twenty-five years. These clauses also direct that in case any of the three shall be living and under the age of twenty-five years at the death of the testatrix, the executor shall hold his or her one-third share in trust, with powers of investment and re-investment, for him or her while under the age of twenty-five years, and pay it to him or her on attaining that age.

The testatrix in closing her said will makes the following provision: "TWENTIETH: I appoint my nephew Samuel A. Blatchford of the city, county and state of New York, the executor of and trustee under this my will, and direct that no bonds be required of him in either capacity."

Sophia E. Blatchford died at Newport, R. I., October 1,

1908. The will was duly probated at Newport, November 9, 1908, and Newton Adams was duly appointed and qualified, and is now the administrator of the estate with the will annexed, Samuel A. Blatchford, named in the will as executor and trustee, having died prior to the death of the testatrix. Newton Adams has also, by decree entered March 9, 1909, been appointed by the Superior Court of this State for the county of Newport substituted trustee under the will, and is now acting as such.

Alice Potter Adams has not yet attained the age of twenty-five years. Of the other two, Francis Hunter Potter was twenty-five years old at the death of the testatrix, and Philip Barton Key Potter became twenty-five less than three month later.

Subsequent to the appointment of said Newton Adams as said trustee and administrator, *c. t. a.*, certain writs of attachment in actions at law against Francis Hunter Potter were levied upon the right, title, and interest of said Francis Hunter Potter in and to said real estate under said will; and there is of record in the recorder of deeds' office in said city of Newport a conveyance by Francis Hunter Potter to his wife, Gwendolyn Cary Potter, wherein he purports to convey one-third undivided interest in and to said property. Said deed is dated the seventeenth day of January, 1910, and recorded on the twelfth day of February, 1910. Otherwise there has been no conveyance of the property or any interest therein.

Newton Adams, in his two capacities as administrator and trustee, Philip Barton Key Potter and Francis Hunter Potter, as parties having adversary interests in the construction of the will and in the title to real estate to be dealt with under the will, have concurred in stating this case for the opinion of the Supreme Court. Since the filing of the petition certain of the attaching creditors above mentioned have entered their appearances and concurred in the statement of facts. The questions on which the opinion of the court is asked are as follows:

First. Did Francis Hunter Potter or Philip B. K. Potter receive, under the said will of Sophia E. Blatchford, any legal right, title, interest or estate in or to said Newport property

above described, which could be conveyed by them or upon which writs of attachment could be levied in actions at law against them?

Second. Can the said Newton Adams, as administrator with the will annexed of the estate of said Sophia E. Blatchford, sell and convey all the right, title, and interest of the said Sophia E. Blatchford at the time of her death in and to the said Newport property and give good and unencumbered title to a purchaser thereof?

Third. If the second question is answered in the negative, by whom can a sale and conveyance of said property be made, and who must concur in such sale and conveyance in order to pass a good title to a purchaser of said property?

By the sixteenth clause of the will all the residuary property, real and personal, is given to the executor, in trust to sell and convert the same into money, as soon as may conveniently be done after the death of the testatrix, and on such terms as he may deem proper, and to dispose of the proceeds of the sale in the manner set forth in the three following clauses of the will. Manifestly these four clauses of the will must be construed together in order to arrive at the intention of the testatrix. The direction is to make division into "*three equal shares*," and to "*pay over*" one share to each of three persons, if they have respectively attained the age of twenty-five years; but to continue to hold in trust the share of any of the three who has not become twenty-five, with powers of investment and re-investment, in personal property, until he or she shall attain that age, and then to "*pay over*." It is quite clear that all of the language

(1) above quoted is consistent and only consistent with an express intention of the testatrix that all the residuary real estate be converted by her executor into personal property for the purpose of making the division into "*three equal shares*." As we construe the above provisions, the testatrix has most clearly and positively directed such conversion, and the whole scheme of the will, as set forth in the clauses above quoted, shows plainly the intention of the testatrix, that her beneficiaries under the provisions of the clauses quoted should receive personal prop-

erty and not real estate. It was said by Durfee, C. J., in *King v. King*, 13 R. I. 501, at p. 506: "The question submitted in this case is: Did the seventh clause of the will of the late Edward King work an equitable conversion of the real estate therein disposed of into personalty? The question, like other questions in regard to the effect of testamentary devises or bequests, is a question of what was the testator's intention; the rule being that in equity the property will be treated as being already what it was intended to become. 1 Story Eq. Juris. § 64 g; 2 Story Eq. Juris. §§ 1212-1214; *Fletcher v. Ashburner*, 1 Bro. Ch. Cas. 497; 1 *White & Tudor Lead Cas.* in Eq. *826, and note; *Craig v. Leslie*, 3 Wheat. 563; *Phelps, Executor, v. Pond*, 23 N. Y. 69; *Dodge et al. v. Williams et als.*, 46 Wis. 70, 97. Did the testator intend to have his real estate, out and out, converted into personalty? If he did, the court will give his intention effect by treating the real as personal property from the time of his decease."

- (2) In accord with the doctrine above set forth, it is well settled that an absolute and not discretionary direction to an executor in a will to sell the real estate and to distribute the proceeds of the sale as money or invest them in personal property, works an out and out conversion of the real estate into personalty so that the interests of the beneficiaries must be treated for all purposes in equity as personal and not real property from the date of the testator's death.

In the case of *Haszard v. Haszard*, 19 R. I. 374, a testator directed his wife as executrix to sell "at as early a period as in the opinion of my said wife shall be consistent with the interest of my estate," certain of his real estate and invest the proceeds, in the name of his four daughters, in one or more savings banks. The testator's wife as executrix, in pursuance of the power conferred upon her, sold the said real estate and also released her dower. It is held that as there was no intimation in the will that the sale of the realty which the executrix was directed to make was for any specific purpose, the sale was an out and out conversion of such realty into personalty, and must be deemed to have been made from the testator's decease.

In *Van Zandt v. Garretson*, 21 R. I. 352, a testator had devised certain real estate to certain persons for their lives, and after their deaths directed that it should be sold and the proceeds of sale divided among their nieces. The beneficiaries under the will, after the executor had died without making any sale, contracted to sell the property in fee simple to the defendant, and upon his refusal to perform the contract, brought a bill in equity to compel performance. It was held that the direction in the will to sell this real estate and distribute the proceeds amounted to an equitable conversion of the estate into personalty; that the complainants could convey neither a legal nor an equitable title to the land itself; and it is also clear that the court was of the opinion that, the executor being dead, conveyance could only be made by an administrator with the will annexed. Hence the bill was dismissed.

And see *Peter v. Beverly*, 10 Peters, *532, *563; *Kane v. Gott*, 24 Wend. 641, 659; *Stagg v. Jackson*, 1 N. Y. 206; 7 Am. & Eng. Enc. of Law (2d Ed.), 465; 9 Cyc. 830, 834.

- (3) It is well settled that when a testator directs his executor to sell his real estate, a discretion given the executor as to the time, manner, or terms of sale, will not prevent an equitable conversion from taking place. 7 Am. & Eng. Enc. 468; 9 Cyc. 837. See also *Haszard v. Haszard*, 19 R. I. 374; *Van Zandt v. Garretson*, 21 R. I. 352; *Stagg v. Jackson*, 1 N. Y. 206, 212. It is also well settled that unless the conversion is expressly directed to be made at some definite or ascertainable time, the conversion takes place as of the date of the testator's death. *Doughty v. Bull*, 2 P. Wms. 320; 24 Eng. Reprint, 748; 9 Cyc. 837.

In the present case it is quite clear that under the will, the duty of the executor to sell is absolute and not discretionary. All the discretion that is given him is as to the time and terms of sale, and as to the time his discretion is confined to very narrow limits by the words "as soon as may be conveniently done after my decease." As to the duty of making a sale with reasonable promptness there is no discretion.

- (4) The executor is undoubtedly given a power of sale by the will, but it is not a power in the ordinary sense, which may or may not be exercised by the donee at his pleasure. On the contrary, the power is given in trust and its exercise is compulsory. As the result of its exercise must be to turn all the real estate into money, which the will directs to be paid to the ultimate beneficiaries, it is quite clear that the testatrix contemplated that these beneficiaries should get no share or interest in her real estate as such, but only a share in the proceeds of its sale.
- (5) There is no direct devise or bequest, to these beneficiaries, of any property, but only of money to be obtained from the sale of property. The legal title to the real estate in question in this case is given to the executor, and the residuary legatees get no right, title, or interest in it, legal or equitable. It follows that they have no right, title, or interest in the real estate which they can convey by deed or upon which attachment or execution can be levied; 7 Am. & Eng. Enc. 476; 9 Cyc. 851, 852. We therefore hold that Francis Hunter Potter and Philip B. K. Potter received under the will no interest of any kind in the devised real estate as such, and we therefore answer the first question stated in the negative.
- (6) For convenience we here repeat the next question propounded, viz.: "*Second.* Can the said Newton Adams, as administrator with the will annexed of the estate of said Sophia E. Blatchford, sell and convey all the right, title, and interest of the said Sophia E. Blatchford at the time of her death in and to the said Newport property, and give good and unencumbered title to a purchaser thereof?" We have no hesitation in answering this question in the affirmative. While it is a well-recognized rule that a mere naked power, the exercise of which is discretionary with the donee personally, and which is not coupled with an interest lasting beyond his life, fails with his death, yet is it equally well settled that a power coupled with an interest beyond the life of the donee, or given in trust in such a way that its exercise is mandatory, survives the death of the donee. In trying to apply this rule to the case of a power of sale given by will to an executor, the courts early encountered the difficulty

that at common law an administrator c. t. a., can only deal with the personal property of the testator and can not exercise any powers given to the executor with reference to real estate. This difficulty has been remedied in most jurisdictions by the passage of statutes. The provision of the statutes of Rhode Island, dealing with the matter, is as follows (Gen. Laws, 1909, Ch. 312. § 26): "Executors for the time being, or administrators with the will annexed, shall have the same powers to sell, lease, or mortgage, and make conveyance of real estate, as are given by will to the original executors, unless such powers be expressly given to such executors as individuals apart from such office, or provision to the contrary be made in the will." (Reënactment of C. P. A. § 840, 1905.)

We find, upon examination of the will here in question, that the power of sale and direction to sell are given to "my executor;" there is nothing in the will to indicate that it was the intention of the testatrix to give such power to the executor as an individual "apart from such office;" nor is there any provision that sale shall not be made by anyone other than the person named as executor. We think the statute plainly covers this case, and that the powers of sale vested in Newton Adams, administrator with the will annexed, upon his appointment and qualification as such, in accordance with former decisions of this court.

In the case of *Bailey v. Brown*, 9 R. I. 79, an administrator *de bonis non* with the will annexed sought to enforce specific performance of an agreement to purchase real estate of his testator. The clause of the will construed in the case, as appears in the opinion of the court, by Durfee, J., was as follows: "I direct that all my just debts be paid, and, for that purpose, I authorize the sale, by my executrix, of any of my estate—real or personal . . . I hereby charge all my real estate, with the payment of all legacies and annuities named in this will. . . . I appoint my wife guardian of the person and estate of my son, during his minority, and also executrix of this my will, and authorize her to sell any of my real estate, and request that no bond, or bond of a nomi-

nal amount only, be required of her, as my executrix." The court says that by the first clause above quoted from the will, an authority to sell real estate for the payment of debts was clearly given to the executrix, and by the last clause, an authority to sell was again given without any express limitation, and the question is whether it was given to the donee personally or as executrix. It is held that it was given to her as executrix and passed to the administrator with the will annexed.

In the case of the *Probate Court of Newport v. Hazard*, 13 R. I. 3, the court, by Durfee, C. J., says, at page 6: "As a general rule, independently of statute, a power to sell land given by will to an executor, will not devolve upon an administrator with the will annexed. But we have a statute, Gen. Stat. R. I. cap. 173, § 32, which provides that the administrator with the will annexed shall have the same power to sell and convey the real estate as may be given by the will to the executor or executors; and the question is, whether, under this statute, the administrator here did not succeed to the power conferred on the executor. The defendants, to show that he did not, cite the case of *Conklin v. Egerton's Adm'r*, 21 Wend. 430. In that case it was held, under a statute enacting that administrators with the will annexed should have the same rights and powers as if they had been named executors, that a power given to an executor by will to sell and dispose of real estate, and divide the proceeds, could not be executed by an administrator with the will annexed, because the statute was to be construed as communicating to the administrator only the powers which the executor had as executor, to wit, his power over the personalty. The construction was narrow and was not received with entire approval. *Egerton's Adm'r v. Conklin*, 25 Wend. 224; *In re Anderson's Estate*, 5 N. Y. Leg. Obs. 302. But, even if correctly decided, the case is no precedent for us; for by our statute the power to sell and convey real estate is communicated in express terms. Accordingly, in *Bailey v. Brown*, 9 R. I. 79, it was decided that an administrator with the will annexed is entitled to execute such a power for the purpose of paying debts and legacies." See

also, to the same effect, *Van Zandt v. Garretson*, 21 R. I. 352, 354.

The law as laid down in the foregoing cases is well supported in other States having statutes such as ours relating to the powers of an administrator with will annexed; it being held that where a power of sale is given by will to an executor for the purpose of paying debts and legacies, or either, and especially where the power of sale is imperative and does not grow out of a personal confidence in the individual and there is an equitable conversion of land into money for the purpose of such payment and distribution, the power belongs to the office of executor and passes to, and may be exercised by, an administrator with the will annexed. *Mott v. Ackerman*, 92 N. Y. 539 at 553; *Potts v. Breneman*, 182 Pa. St. 295; Chaplin on Express Trusts and Powers, §§ 604-606; 11 Am. & Eng. Enc. 1323, note 3. The rule is well expressed by Mr. Chaplin as follows, § 606, p. 490: "Where a testator devises land to his executors, with a power to sell in order to distribute, and the directions are such as to effect an equitable conversion, the title to the property (as personalty) vests in the executors, as such, by operation of law; and to accomplish the purpose of the imperative direction in the will, it is within their power, and is imposed on them as a duty, by virtue of their office as executors, to execute the power of sale. The proceeds, when received by them, would be legal assets in their hands for which they would be required to account. And all this is so though they are directed to hold a portion as trustees on a trust to receive and pay over rents. And a successor as trustee cannot execute the power. To do so he must succeed as administrator with the will annexed."

It is quite clear that the power of sale was vested in the executor as such, under clause sixteenth of the will, and was not vested in him under the provision of the three following clauses, wherein he is directed, in certain contingencies, to hold one or more "shares" of the fund derived from the conversion in trust until the party entitled to the same shall become twenty-five years of age. The real estate in question is

given to the executor as such, and the power of sale is plainly conferred in aid of executorial duties, for the purpose of facilitating the payment of legacies in the form desired by the testatrix. It is true that it may be necessary to hold some of the proceeds of the sale in trust for a time in consequence of one or more of the legatees named being under the age of twenty-five years, but that does not alter the nature of the power of sale.

- (7) It is obvious that, if Samuel A. Blatchford had lived to execute the will completely, he would be acting strictly as executor in selling the land and dividing the proceeds of the sale and paying over their shares to the legatees who were over the age of twenty-five years; and that in holding the share of any one who was under that age he would be acting as trustee. His legal duty would be to transfer such share from himself as executor to himself as trustee. It follows, therefore, that Newton Adams holds the power of sale as administrator with the will annexed and must exercise it in that capacity, having no active duties to perform as trustee until he has set aside the share of Alice Potter Adams, which he is to hold in trust for her. This being so, it is the opinion of the court that he can, as administrator with the will annexed, sell and convey the
- (8) Newport property involved in this case, so as to convey all the right, title, and interest which the said Sophia E. Blatchford had at the time of her death, in and to the said Newport property, free and clear of any incumbrances attempted to be placed upon it since that time, whether by way of attachment in the several suits at law, mentioned in the petition, or by way of the deed from Francis H. Potter to Gwendolyn Cary Potter, dated January 17, 1910, whereby it was purported to convey one-third undivided interest in the land in question to said Gwendolyn Cary Potter.

In view of the foregoing opinion, it becomes unnecessary to further answer the third question.

We have examined the arguments and cases cited by the counsel for the petitioners in support of views contrary to the decision hereinbefore set forth, and find nothing therein to

shake our conclusions. The cases cited relating to the question of equitable conversion are all cases where the courts, upon their construction of the various wills in question, found that there was no intention on the part of the testators to make an out and out conversion, dating from the testator's death, but only powers of sale resting in the discretion of the donee of the power. The cases cited on the question of whether the power of sale was personal to the individual named, or was given to the executor as such, *virtute officii*, and passed over to the administrator with the will annexed, are equally inconclusive of this case, because in each case the courts construed the will as showing an intention to repose confidence in the individual rather than to annex the power to the office; whereas our construction of the will here in question is otherwise, as above shown.

Gardner, Pirce and Thornley for Newton Adams, Admr., etc.
William W. Moss, of counsel.

Barney and Lee, for Phillip B. K. Potter and Francis H. Potter.

Francis I. McCanna, of counsel.

Sheffield, Levy and Harvey, Charles H. Koehne, Jr., for certain attaching creditors.

NETTIE G. EDDY vs. CLARENCE H. MATHEWSON *et al.*

JANUARY 11, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, and Sweetland, JJ.

(1) *Wills. Construction. "Children." "Grandchildren."*

Testamentary provision: "After the decease or marriage of my wife, I give, devise, and bequeath all said estate to her children to be and remain to them their heirs and assigns forever. Excepting however from the provisions of this clause, the heirs of my daughter Nettie G. Eddy, deceased." Nettie G. Eddy was the name of testator's granddaughter, the daughter of his daughter, who married an Eddy.

Held, that the plain intent was to exclude the heirs of his daughter from participation in the residue, and to devise it to the children of his wife living at the time of her death.

Held, further, that the word "children" in a will, is to be understood in its simple and primary signification when possible, and not so as to include grandchildren, unless it is necessary to hold so to give effect to the words of the will, or to the evident intent of testator.

BILL for construction of will.

DUBOIS, C. J. This is a bill in equity for the construction of the last will and testament of John W. Mathewson, late of the town of Smithfield, deceased. The bill is brought by Nettie G. Eddy, who claims to be interested in the property and estate of the testator, both as a legatee and as the sole heir of her mother, Antoinette (Mathewson) Eddy, a daughter of the testator. The two respondents are the only other persons interested in the provisions of the will, and are the two sons of the testator and, therefore, the uncles of the complainant. The three parties are all the heirs of the testator and his wife. The respondents have filed an answer, issues have been joined, the testimony of witnesses has been taken, and the cause, being ready for final decree, has been certified to this court in accordance with section 35 of chapter 289 of the General Laws of 1909.

It appears that John W. Mathewson died June 12, 1901, leaving a last will which was probated by the Probate Court of Smithfield, and a copy thereof is annexed to the bill of complaint. The will is dated February 15, 1884. The provision which the complainant seeks to have construed is the third paragraph of the will, namely: "*Thirdly*. After the decease or marriage of my said wife, I give, devise and bequeath all said estate both real and personal to her children to be and remain to them their heirs and assigns forever. Excepting, however from the provisions of this clause, the heirs of my daughter Nettie G. Eddy, deceased."

By the first clause of his will the testator made the following bequest: "I give and bequeath to my grandchild Nettie G. Eddy daughter of John L. Eddy the sum of twenty-five dollars." It is to be noted therefrom that he omits to give the name of his daughter, but does give in full that which is con-

(1)

ceded to be the correct name of his granddaughter, the daughter of his daughter who married John L. Eddy, and in fact the only daughter named Eddy. It appears that his other daughters died in infancy, unmarried and intestate. It may be further noted that in the third paragraph of his will no bequest or legacy is given to the heirs of his daughter, but that the plain intent thereof is to exclude them from any participation in the residue of the estate therein disposed of. If this clause had been written: "Excepting, however, from the provisions of this clause Nettie G. Eddy, the heir of my daughter, deceased," no question could have arisen as to the intent of the testator. But to our minds it is perfectly plain that he meant to accomplish that result. He did have a deceased daughter who had been the wife of John L. Eddy; the only heir of that daughter at the time of the execution of the will was Nettie G. Eddy, the complainant. The deceased daughter was named Antoinette, the diminutive of which is "Net, Netty." Webster's International Dict.

The object to be accomplished in the construction of a will is to ascertain the intent of the testator, in order that the same may be carried into effect according to law. The evident intent of the testator, as expressed in the third clause of his will, is to devise and bequeath the residue of his estate to the children of his wife living at the time of her death; but out of abundant caution he added the unnecessary clause to the effect that the heirs of his deceased daughter should not participate therein. His plain intent will be defeated by a construction which will include the complainant. Nor is there anything in the law which requires it. The word "children," when used in a will, is to be understood in its simple and primary signification, when it can be so understood, and it can not be held to include grandchildren unless it is necessary to hold so in order to give effect to the words of the will or to the evident intent of the testator. *Tillinghast v. D'Wolf*, 8 R. I. 69; *Winsor v. Odd Fellows*, 13 R. I. 149; *Williams v. Knight*, 18 R. I. 333; *Will of Reynolds*, 20 R. I. 429; *Tiffany v. Emmet*, 24 R. I. 411. We therefore construe

the third paragraph of the will to exclude the complainant and to include the respondents.

A form of decree in accordance with this opinion may be presented for allowance.

James B. Littlefield, for complainant.

Irving Champlin, James Harris, for respondents.

STATE v. HAND BREWING COMPANY.

JANUARY 4, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Constitutional Questions.*

Upon a complaint certified to the court upon constitutional questions, technical objections will not be considered.

(2) *Constitutional Law. Search-Warrants. Registration of Bottles, &c.*

Gen. Laws, 1909, cap. 198, §§ 2-3 (of the protection of owners of cans, bottles, &c.), is not obnoxious to Cons. R. I., art. 1, § 10, or to Cons. U. S., art. XIV, § 1 of amendments.

Gen. Laws, 1909, cap. 198 (of the protection of owners of cans, bottles, &c.), provides that, upon complaint duly made, the court shall issue a search-warrant, and shall also cause to be brought before it the person in whose possession the receptacles are found, and shall enquire into the circumstances of such possession, and if it finds that such person has been guilty of violating the act, shall impose the punishment therein provided, &c.

A search-warrant, issued under said chapter, directed the officer, if any of the articles were found, to bring them, together with the body of the person in whose possession they were found, before the court to be dealt with as to law and justice should appertain:—

Held, that the search-warrant issued was a proceeding *in rem* against the goods, and the fact that it contained a command to also bring the body of the person in whose possession the goods were found did not change its character.

Held, further, that there was nothing in the statute to indicate that the person so brought before the magistrate was to be arraigned or tried upon the complaint which was the foundation for the search-warrant.

Held, further, that whether the arrest was made under the search-warrant or upon process issued contemporaneously therewith or subsequent thereto, a complaint for violation of the statute should have been made, and upon that complaint the accused could have been tried.

Held, further, that the irregularities in the case at bar were not occasioned by the statute, and did not arise from a compliance with its provisions; and (*semble*) even if such proceedings were absolutely void for unconstitutional irregulari-

ties, that would not affect the constitutionality of the statute unless such irregularities were made essential requisites by its terms.

CRIMINAL COMPLAINT. Certified on constitutional questions.

DUBOIS, C. J. This case has been brought before this court, upon certification of certain constitutional questions, from the District Court of the Tenth Judicial District. It appears that the following complaint was made to the justice of said court: "To Lellan J. Tuck, Esquire, Justice, Robert S. Emerson, Esquire, Clerk of the District Court of the Tenth Judicial District, in the county of Providence in the State of Rhode Island and Providence Plantations.

"Bernard M. Dowd of North Providence in the county of Providence in State of Rhode Island, agent for the Five Sullivan Bros., Incorporated, on oath complains in the name and behalf of the State, that he is the duly authorized agent of said the Five Sullivan Bros., Incorporated, that said the Five Bros., Incorporated is engaged in the manufacture, bottling and selling of soda water, mineral water, aerated water, beer, ales, wines, cider, milk, cream, under the name of the Five Sullivan Bros., Incorporated, that it is the owner of and in its business aforesaid, does use bottles, jugs, cans, tins, casks, barrels, kegs, trays, crates, boxes, siphons, fountains, each of which said bottles, jugs, cans, tins, casks, barrels, kegs, trays, crates, boxes, siphons, fountains, have branded, stamped, engraved, blown or etched, carved, thereon the name, mark, device and designation of ownership is as follows to wit: the bottles capacity 14 oz:—'Registered, The Five Sullivan Bros., Prov. R. I.' inside a circle, together with the word 'Registered' outside of circle, or 'The Five Sullivan Brothers, Trade Mark,' together with the figure '5' and 'Providence, R. I.' inside a circle and the word 'Registered' outside of circle, or 'Sullivan Bros. Providence, R. I.' with monogram 'F. S. B.' inside of circle, and the word 'Registered' outside of circle.

"That the said the Five Sullivan Bros., Incorporated in compliance with the provision of Chapter 627 of the Public Laws of Rhode Island, did on the 16th day of March, A. D.

1903, file in the office of the Secretary of said State of Rhode Island a description of the name, mark, device and designation of ownership aforesaid, and did cause such description thereafter to be printed once a week, for three successive weeks in the Providence News a newspaper published in said city of Providence.

"That your complainant has reasonable cause to believe and does believe that the following personal property to wit: Five hundred bottles each of the value of five cents and all of the value of twenty-five dollars of the property of the said the Five Sullivan Bros., Incorporated, and upon which appears the name, mark, device and designation of ownership aforesaid, branded, stamped, engraved, blown or etched, carved and affixed thereon, are in the possession of the Hand Brewing Company of Pawtucket unlawfully, without the consent in writing and without having been purchased from the said the Five Sullivan Bros., Incorporated, and are being unlawfully held, used, and disposed of and trafficked in by said Hand Brewing Company without the consent in writing and without having been purchased from the said the Five Sullivan Bros., Incorporated, and that said bottles are now secreted and concealed in a certain building, shop, store, barn and premises numbered 17 and situate on Freeman street so called, in the said city of Pawtucket and within the Judicial District of said court, and against the statute and the peace and dignity of the State.

"Wherefore your complainant prays for a warrant to search said building, shop, store, barn and premises, 17 Freeman street for said bottles and that the same may be awarded to the possession of the said

"Dated at said Pawtucket, this 22nd day of June, A. D. 1910.

"BERNARD M. DOWD,

"Complainant.

"PROVIDENCE, SC.—In Pawtucket this 22nd day of June, A. D. 1910, personally came Bernard M. Dowd, subscriber to the above complaint, and made oath to the truth of the same,

and at the same time and place himself as principal, and John H. Branaghan as surety, recognized according to law, in the sum of fifty dollars, to prosecute said complaint with effect, or in default thereof to pay all lawful costs which may accrue thereon, to the State.

“Before me, LELLAN J. TUCK,
“*Justice of the District Court of the Tenth Judicial District.*”

and that said justice thereupon issued the following warrant to said complaint annexed: “State of Rhode Island and Providence Plantations. Providence sc.—To the Sheriff of the County of Providence, his deputies or to either of the Town Sergeants or Constables in the County of Providence, Greeting:

“Complaint having been made to me on oath as above written, you are therefore hereby required in the name of said State of Rhode Island and Providence Plantations, to search thoroughly the building, shop, barn and premises, 17 Freeman street in said complaint described in the daytime, and to seize and to take into your possession the bottles in said complaint described and if the same or any part thereof shall be found upon search, that you bring the bottles so found together with the body of the person or persons in whose possession the same are found before the District Court of the tenth Judicial District, to be disposed of and dealt with as to law and justice shall appertain. And for so doing this shall be your warrant. Hereof fail not.

“Given under my hand and seal, at Pawtucket in said county, this 22nd day of June in the year A. D. 1910.

“LELLAN J. TUCK,
“*Justice of the District Court of the tenth Judicial District.*”

and that the same was served by Bernard M. Dowd, constable, who made the following return thereto: “I have searched thoroughly the building, shop, store and premises located 17 Freeman street in the within complaint described, on the 23rd day of June in the daytime and have seized and taken possession of 373 bottles there found in said complaint described and have the said bottles so found here in Court, and I have also apprehended Michael Hand for Hand Brewing Company the

person in whose possession the same were found and have here before the Court, as within commanded.

"Service	3.00
Travel.....	.20
Attendance.....	.50
Aid 4 Persons.....	4.00
	<hr/>
	7.70

"BERNARD M. DOWD,
Constable."

which was afterwards amended by permission of said court to conform to the facts, as follows:

"STATE OF RHODE ISLAND, &C.
"PROVIDENCE, SC.

"I have searched thoroughly the building, shop, store and premises located at No. 17 Freeman street, in the within complaint described, on the 23rd day of June, A. D. 1910, in the day time and have seized and taken possession of 373 bottles there found and in said complaint described, and have the said bottles so found here in Court; and I have also summoned the said Hand Brewing Company, to appear before said Court, to answer to said complaint and warrant, by notifying Michael Hand, Jr., President and an officer of said corporation, of the pendency of said complaint in the District Court of the Tenth Judicial District, and that the same would be heard before said court on the 30th day of June, A. D. 1910.

"Service

"Travel

"Aid

"BERNARD M. DOWD,
"Constable."

It also appears of record in said case that the defendant was arraigned June 30, 1910, and that the case was "continued to July 5, 1910, to plead;" that the defendant pleaded not guilty, and that the case was continued to July 11, 1910. On the last

mentioned day the defendant filed in said court a motion to quash the complaint, as follows: "The defendant in the above entitled complaint for the purpose of bringing in question upon the record of the constitutionality of chapter 198 of the General Laws of the State of Rhode Island moves that said complaint may be quashed, and that it may be discharged, and for reason therefor shows to the court as follows:—

"*First.* That said complaint and warrant is issued on information and belief for the purpose of searching, and states that the complainant has reason to believe that certain bottles are concealed and are illegally being acquired, held, used and disposed of in violation of chapter of the General Laws.

"*Second.* That said act directs that the person so found in possession shall be brought before the court and that thereupon upon an examination before the court, said person, if the court adjudges him guilty, shall suffer the penalty prescribed by said act.

"*Third.* That said complaint charges no offence known to the law and is void and should be quashed for uncertainty, in that it doesn't apprise the defendant of the criminal acts wherein the Co. is charged with sufficient certainty to enable him to make his defence.

"*Fourth.* That said act of the General Assembly is unconstitutional and void, because it conflicts with section 10 of article 1 of the Constitution of Rhode Island, and with section 1 of article 14 of the Amendments of the Constitution of the United States.

"*Fifth.* That said act of the General Assembly is unconstitutional under said section 10 of article 1 of the Constitution of the State of Rhode Island, because the said act directs the court upon the return of the search-warrant and the apprehension of the person found in possession of the goods described in the search-warrant under said search-warrant without any charge being preferred other than the information and belief contained in the search-warrant to examine the person so found in possession and to adjudge his guilt or innocence and to enforce the penalty prescribed in said act and the accused thereunder,

no formal complaint having been lodged, has no means of knowing in advance whether the acts mentioned constituted a crime and is denied the right guaranteed by said section in the Constitution to be informed of the nature and cause of the accusation, and further that said statute, by reason of said uncertainty may deprive him of his liberty and property without due process of law.

"Sixth. That said act of the General Assembly is unconstitutional under said section 1 of article 14 of the Amendments of the Constitution of the United States, in that by said uncertainties of its language the State of Rhode Island contrary to said Constitutional provision may deprive the defendant of its liberty and property without due process of law.

"Wherefore, the defendant prays that his aforesaid motion may be granted by the court for uncertainty of said complaint, as above specified, or said motion being denied, the question as to the constitutionality of said act may be forthwith certified to the Supreme Court to be heard and determined as provided by section 1, chapter 198 of the General Laws."

And on the twenty-seventh day of said July the case was certified to this court upon the following certification of constitutional questions:

"In the above-entitled case now pending in the District Court of the Tenth Judicial District, complaint in writing is made to the Justice of said Court that the complainant had reasonable cause to believe and did believe, that certain bottles which had been duly registered under section 1 of chapter 198, of the General Laws of the State of Rhode Island, were being unlawfully used, disposed of, trafficked in and secreted by the defendant, and that the same were secreted and concealed in a certain building, shop, store, barn and dwelling-house and premises number 17 on Freeman street in Pawtucket, in said district; and said complainant prayed for a warrant to search said building, shop, store, barn, dwelling-house and premises, and that said bottles if found might be awarded to the possession of the owner thereof, all of which more fully appears by reference to said complaint which is herein transmitted. And

thereupon a warrant was issued by said court as prayed for, commanding the officer to seize and to take into his possession the bottles in said complaint described, if the same or any part thereof should be found upon search, and that he bring the bottles so found together with the body of the person in whose possession the same were found, before said District Court, to be disposed of and dealt with as to law and justice shall appertain.

"Upon the return of said warrant duly served it appeared from the officer's return thereon that the bottles mentioned in said chapter 198 and described in said warrant were found in the possession of the defendant and that the officer entrusted with said service had said bottles and said defendant before said court as commanded in said warrant.

"In the course of the proceedings in said case and before the trial thereof said defendant filed a motion to quash said complaint and said motion raised the following constitutional questions in said cause.

"*First.* Is said chapter, Sec. 2-3 unconstitutional and void because it conflicts with Sec. 10 of Art. 1 of the Constitution of the State of Rhode Island and with Sec. 1 of Art. 14 of the amendments of the Constitution of the United States.

"*Second.* Is said chapter, sec. 2-3 unconstitutional under said Sec. 10 of Art. 1, of the Constitution of the State of Rhode Island, because the said act directs the Court upon the return of said warrant and the apprehension of said defendant without any charge being preferred other than the information contained in the search-warrant to examine the said defendant and to adjudge his guilt or innocence and to enforce the penalty provided in said act.

"*Third.* Is said Chap. 198 unconstitutional under said Sec. 10 of Art. 1 of the Constitution of the State of Rhode Island, because it directs the defendant to be tried for a violation of Sec. 2 of said chapter without formal complaint having been lodged, the said defendant having no means of knowledge whatever other than from search-warrant and from the terms of said chapter of any of the offenses with which he is charged.

"*Fourth.* Is said chapter unconstitutional because it denies

the right to the defendant granted by said Sec. 10 of Art. 1 of the Constitution of the State of Rhode Island, to be informed of the nature and cause of the accusation against him or because said defendant may be deprived of his liberty and property without due process of law.

"Fifth. Is said chapter unconstitutional and void under said section of Art. 14 of the amendments to the Constitution of the United States in that by the uncertainties of its language the State of Rhode Island contrary to said constitutional provision might deprive the defendant of his liberty and property without due process of law.

"Wherefore, it is ordered on this 27 day of July, A. D. 1910, that said constitutional questions raised as aforesaid be sent to the Supreme Court to be heard and determined.

"LELLAN J. TUCK,

"Justice."

- (1) The only questions that we are called upon to consider are the constitutional ones certified to us. Whether the complaint in the case at bar should be held to be void for duplicity upon a motion to quash made before the entry of the plea of not guilty, or whether the complaint is open to other objections that might have been made upon such a motion seasonably filed, are matters not before us for consideration, because all objections that are susceptible of being cured by a plea of not guilty have been so cured by reason of the fact that such plea preceded the motion to quash. Moreover, technical objections are not before us upon this constitutional inquiry.
- (2) The first question presented to us is whether Gen. Laws, 1909, cap. 198, §§. 2 and 3, is unconstitutional and void because it conflicts with art. I, § 10, of the constitution of the State and with art. 14, § 1, of the amendments to the constitution of the United States. Article I, § 10 aforesaid has reference to the rights of the accused in criminal prosecutions, and the question doubtless especially refers to the following clause: "nor shall he be deprived of life, liberty or property, unless by the judgment of his peers, or the law of the land." And art. 14, § 1,

of the amendments to the constitution of the United States is invoked undoubtedly because of the following provision. "nor shall any state deprive any person of life, liberty or property, without due process of law." Gen. Laws, 1909, cap. 198, whose constitutionality has been questioned, is entitled: "Of the protection of owners of cans, bottles, and other vessels used in the sale of mineral waters, milk, beer, cider, wine, or other beverages and compounds." It contains four sections, whereof sections 2 and 3 are particularly referred to as violating the constitutional provisions hereinbefore referred to. Each of said last-mentioned sections contains a reference to section one, and for the purposes of explanation it may be well to refer to each of said sections, which read as follows: "SECTION 1. Any person engaged in manufacturing, bottling, or selling soda waters, mineral or aerated waters, or any kind of beer, ales, wines, cider, milk, cream, or any other liquids that may be lawfully used as food or beverage, or any medicines, medical preparations or mixtures, perfumery, oils, compounds or mixtures, in bottles, jugs, cans, tins, casks, barrels, kegs, trays, crates, boxes, siphons, fountains, or any other kind of vessel whatsoever, upon which any name, mark, device, or other designation of ownership is branded, stamped, engraved, blown, etched, carved, or otherwise produced, may file in the office of the secretary of state a description of the name, device, or other designation of ownership so used by him, and cause such description to be printed once a week for three successive weeks in some newspaper published in the city of Providence. After such description shall be filed and published as aforesaid, the secretary of state shall give such person a certificate under the seal of his department that the description aforementioned has been filed and published according to law, and such certificate shall be received in all legal proceedings as evidence of such filing and publishing.

"SEC. 2. It is hereby declared to be unlawful for any person, copartnership, or body corporate, other than the manufacturer, bottler, or dealer whose name, mark, device, or other designation of ownership is upon any vessel or receptacle men-

tioned in section one of this chapter, and which has been filed and published as aforesaid either by themselves or through any agent or employee, to buy, sell, offer for sale, take, give, receive, handle in the course of business except when containing the liquid therein placed by the owner, bottler, or manufacturer, hire, rent, lend, transport, carry in wagons, carts, push-carts, or other vehicles, or to take or collect from ash or garbage receptacles, from public or private dumps, cellars, yards, lots, or premises, or to keep in stock or otherwise store or dispose of, deal or traffic in the same or any parts or pieces of the same, without the written consent of said manufacturer, bottler, or dealer, respectively, whose name, mark, or device, or other designation of ownership shall be therein or thereon. And without such written consent injure any such vessel or receptacle, or to wilfully mar or erase, cover up, conceal, or remove any such name, brand, mark, or other designation of ownership so appearing upon such vessel or receptacle, or without such written consent, for the purpose of trade or gain, to fill any such bottle, vessel, or other receptacle with any beverage, liquid, medicine, compound, or substance whatsoever, except bottles having contained a prescription may be refilled for any medicinal purposes. And if any of the within-described bottles, vessels, and receptacles are found in possession of any person, copartnership, or body corporate other than the manufacturer, bottler, dealer, or legal purchaser or purchasers or receiver thereof without the written consent of such manufacturer, bottler, or dealer, the same may be seized by any peace-officer, police-officer, or any inspector of any incorporated state bottling protective association who is also a peace-officer, without warrant, wherever he shall find the same being illegally held or used, as specified in this section, and may detain the same in some place of sale keeping until a warrant can be secured against the person so illegally holding or using the same. Any person offending against the provisions of this section shall be punished by imprisonment for not more than three months, or by a fine of one dollar for each and every such vessel or receptacle so filled, sold, given, held, disposed of, or trafficked in, or from

which the name, device, or other designation of ownership has been erased, defaced, covered up, or otherwise removed or cancelled, or by both such fine and imprisonment.

"SEC. 3. Whenever any person believes that any vessel or other receptacle aforesaid having a name, mark, device, or other designation of ownership therein or thereon, of which a description has been filed and published as mentioned in section one of this chapter, is being unlawfully acquired, used, or disposed of, or having been unlawfully acquired is being unlawfully secreted in any place, the aforesaid person or his agent may make complaint in writing, under oath, before the justice or clerk of the district court of the district within which the same is being unlawfully acquired, used, disposed of or secreted, that he has reasonable cause to believe, and does believe, that the same is being unlawfully acquired, used, disposed of or secreted, and thereupon the justice or clerk of the district court, if he be satisfied that there is reasonable ground for such belief, the place to be searched and the things to be seized being described as nearly as may be, shall issue a search-warrant for the purpose of searching for and seizing the same, and shall also cause to be brought before him the person or persons in whose possession the same are found, and shall then enquire into the circumstances of such possession, and if he finds that such person or persons have been guilty of violating section two of this chapter, he shall impose the punishment provided in said section two, and shall also award possession of the property taken upon such warrant to the owner thereof."

The purpose of the act, to protect the owners of receptacles for fluids and compounds, is plainly set forth in its title. Section one provides for the registration of the several designations of ownership of such receptacles by the owners thereof. Section two regulates the use and prohibits the injury or destruction of such registered receptacles by natural or artificial persons other than the owners, and prescribes a penalty for the violation of its provisions. It also makes provision for the seizure, without warrant, of such registered receptacles found in the possession of others than the owner or purchaser, without

the written consent of the owner. Section three treats of the issuance of search-warrants, and in case of the seizure thereunder of registered receptacles found in the possession of any person, provides for an inquiry into the circumstances of such possession, by the magistrate who issued said search-warrant, with power to bring before him and to punish persons found guilty of violating the provisions of section two, and to award to the owners possession of the property taken. The constitutional provisions concerning search and seizure are contained in the constitution in art. 1, § 6, which reads as follows: "SEC. 6. The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized." No claim is made that the statute in question does not conform to these requirements.

The defendant raises the objection that the statute makes a person liable for the possession of the prohibited articles, although the same had been placed upon his premises by his employes without his knowledge or consent. It will be time enough to determine such a case when it arises. No such question has arisen in the case at bar.

The defendant makes the further claim that there are no specific charges in the warrant to which the defendant may answer, and that, in accordance with the statute aforesaid, the warrant may issue without specific charges. We do not so read the law, and we have no information that any complaint has yet been made or any warrant has been issued against the defendant for any violation of chapter 198 aforesaid, that is to say, no proceedings *in personam* have been taken against the defendant. The search-warrant issued is a proceeding *in rem* against the goods searched for and seized. The fact that the search-warrant contains a command to the officer to "bring the bottles so found together with the body of the person or persons in whose possession the same are found before the . . . court

. . . to be disposed of and dealt with as to law and justice shall appertain" does not change the character of the warrant. "A search-warrant is generally defined to be an order in writing in the name of the State, signed by a magistrate and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate." 35 Cyc. 1265.

"At common law it seems to have been necessary to the sufficiency of a search-warrant to command that the goods, together with the person in whose possession they were found when taken, should be brought before the magistrate and after an examination of the facts be disposed of according to law." *Idem*, 1267. "It (the search-warrant) should also command that the goods found, together with the party in whose custody they are taken, be brought before some justice of the peace, to the end that, upon further examination of the fact, the goods and the prisoner may be disposed of as the law directs." 1 Archbold's Crim. Pract. & Pl. 8th ed. p. 130. See also Bouvier Law Dict. *Search-Warrant*. "Upon the return of the warrant which has been issued for the search of personal property that has been stolen, when executed, the magistrate must proceed as follows. If it appear that the goods brought before him were not stolen, they are to be restored to the possessor. If it appear that they were stolen, they are not to be delivered to the owner, but deposited in the hands of the officer who executed the warrant, to the end that the party from whom they were stolen may proceed to complain of, or indict, and convict the offender, and thereupon to have restitution of them. A conviction of larceny cannot legally be founded upon a search warrant. If the goods are found in the place described, a new complaint should be made, directly charging the suspected person with feloniously taking them. If it appear that the goods were not stolen, the party in whose possession they were found is to be discharged. If the goods were stolen, but not by him, but by another who sold or delivered them to him, and he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence against him that sold them; but if it appears that he was knowing they were stolen,

he ought to be bound over to answer as a receiver of stolen goods,"—Heards Crim. Law. 122, citing 2 Deacon Crim. Law 1166, and 2 Gabbett Crim. Law, 158. See also Cooley Cons. Lim. 6th ed. 369; 19 Encyc. Pl. & Pr. 333.

In the case of *Bell v. Clapp*, 10 Johns. (N. Y.) 263, 265, which was an action of trespass *qu. cl. fr.*, for entering plaintiff's dwelling-house and taking away 100 bbls. of flour, the defendants pleaded in justification that the breaking and taking was under and by virtue of a search-warrant, etc. On demurrer the court held the plea good, and ordered judgment for the defendants. In the course of the opinion the court used the following language: "The warrant did not state in whom the property of the flour resided, nor was this essential to its validity; a person may even be indicted and convicted of stealing the goods of a person unknown. Nor did it affect the legality of the warrant that it directed the officer to bring *Jacques*, to whom the cellar belonged, *or the person in whose custody the flour might be found*. It was impossible for any warrant to be more explicit and particular; and it would, probably, have been the duty of the officer to have arrested any person in possession of the stolen goods at the place designated, without any directions in the warrant, and to have carried him before the justice for examination."

The common-law rule, in relation to search-warrants, above referred to, has generally been included in the statutes of the several States. Thus in the Rhode Island Revised Statutes (1857), we find that in a search-warrant for stolen goods the officers to whom the warrant is directed are commanded to bring the money or thing stolen before the magistrate, and the person or persons in whose possession or custody the same shall be, cap. 220, § 30; also in the case of a search-warrant for a female in a house of ill-fame, the officers are directed to bring her, and the person in whose possession or keeping she may be found, before the magistrate, cap. 216, § 5. Similar provisions are contained in Pub. Laws, 1909; cap. 281, § 31; cap. 347, § 7. Although the persons in possession of the female or stolen article, as the case may be, are to be brought before the magistrate,

there is nothing in the foregoing statutes to indicate that they are to be arraigned or tried upon the complaint which was the foundation for the search-warrant. Nor is there anything in the statute under consideration in the present case to warrant such a conclusion. In fact, the language of Gen. Laws, cap. 198, § 3, is not quite as exigent as that contained in the other statutes referred to: "the justice or clerk . . . shall issue a search-warrant for the purpose of searching for and seizing the same, *and shall also cause to be brought before him the person or persons in whose possession the same are found,*" etc. That would seem to imply that if the goods are found, by the officer serving the search-warrant, to be in the possession of some person the officer shall inform the justice or clerk of that fact, whereupon the justice or clerk shall cause the person to be brought before him upon suitable process. In the case at bar, no complications need have arisen. The complainant was Bernard M. Dowd; he was also the officer who served the search-warrant. He was the one who found the bottles and the person in possession of the same. He could have made complaint against such person for violation of the statute, and upon that complaint the accused could have been tried. That should have been the proceeding, whether the arrest was made under the search warrant or upon process issued contemporaneously therewith or subsequent thereto. The irregularities complained of in the case at bar were not occasioned by the statute in question, and did not arise from a compliance with its provisions. Even if the statute should be construed so as to require the arrest, upon search-warrant, of the person found in possession of the articles seized; which would have been the usual and ordinary procedure following the common-law rule; there is nothing therein that can be held to require the trial of such person upon the search-warrant, and, if found guilty of some offence under section 2, his conviction and sentence thereupon. Even if the proceedings were absolutely void, for unconstitutional irregularities, a question which we are not called upon to consider in the present inquiry, that would not affect the constitutionality of the statute unless the irregularities complained of are made

essential requisites by its terms. We do not find the statute objectionable in this regard.

For these reasons the first, second, third, and fourth constitutional questions must be answered in the negative. As to the fifth question, our attention has not been directed to any uncertainties in the language of the statute in question, whereby the State of Rhode Island might deprive the defendant of his liberty and property without due process of law, and therefore this question must also be answered in the negative.

Having thus answered the constitutional questions certified to us, the papers in the cause, with our decision certified thereon, are hereby remitted to the District Court of the Tenth Judicial District for further proceedings.

James F. Murphy, Thomas F. Vance, Frank H. Wildes, for complainant.

C. J. Farnsworth, for defendant.

FREDERIC E. TALBOT *et al.* vs. JEANNETTE A. TALBOT *et al.*

JANUARY 11, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Voluntary Trusts, Inter Vivos.*

In order to create a valid voluntary trust, *inter vivos*, where the donor is not trustee, there must be an intent to make a present transfer of ownership upon trust, and the donor must do everything that according to the nature of the property, is necessary to execute that intent.

(2) *Trusts. Completed Trusts. Delivery.*

After death, executors found, in safe deposit of testator, certificates of stock, in name of testator, unendorsed; and also certain instruments, signed by testator, purporting to create trusts in various shares of stock by conveying same to trustees to pay the income therefrom to testator for life, and after his death to various beneficiaries.

Upon the question as to whether testator created valid trusts of these stocks:—*Held*, that the two questions to be determined were; first one of fact, whether testator intended to make a present transfer of the stock to the trustees; and second, one of law, as to whether he did all that was necessary to transfer the ownership of the shares.

Held, that from the instruments themselves and from the facts in evidence, testator intended to create trusts in the shares to come into existence by means of and upon delivery to the trustees of the certificates and of the assignments.

Held, further, that, from the evidence, the several deliveries to one of the trustees of the certificates and assignments were sufficient to create a completed trust *in presenti*, although there was at that time no delivery to the other trustees, and they were not notified of the creation of the trusts until after the donor's death, and that such delivery was all that was necessary to be done by the donor to transfer the ownership of the shares.

Held, further, that the facts that he did not endorse the certificates, that he received the dividends after the trusts were created, and that he did not inform but one of the four trustees, about the trusts, were not, upon the facts of the case, inconsistent with an intent to make a present delivery.

(3) *Transfer of Stock.*

The printed form of transfer with power of attorney, upon a stock certificate, while it furnishes a convenient means of transfer, is not the only way in which it may be made. A transfer of ownership may be made by delivery of unendorsed certificates, together with specific assignments.

(4) *Trusts in Presenti. Dividends.*

Where a settlor reserves a life interest, the receipt of dividends is not inconsistent with an intention to create a present trust.

(5) *Trusts. Intent.*

In determining the question of intention to create present trusts, the facts should be construed as strongly as possible in favor of the trust.

(6) *Trusts in Presenti. Delivery.*

In attempting to create a present trust it is not important that, after delivering the assignment of the stock certificate to the trustee, the latter returned it to the donor, since a delivery is not defeated by a return of the instrument.

(7) *Trusts. Delivery. Power of Revocation.*

A power of revocation contained in an assignment of certificates of stock in trust, does not affect the validity of the delivery or of the trusts thereby created.

(8) *Trusts. Delivery.*

Delivery to and acceptance by the trustee, or even knowledge of the trust on his part, are not essential to the validity of the trust as against the settlor, and the fact that the trustee declines to execute the trust does not defeat it or affect the rights of beneficiaries.

(9) *Stock. Delivery. Gifts. Trusts.*

Shares of stock are, or are in the nature of, choses in action which are represented by the certificates.

The delivery of such certificates with a written assignment, but without endorsement or registration, constitutes a valid gift.

(10) *Trusts in Presenti.*

A conveyance of stocks in trust is none the less present, because of the fact that one of the evident purposes of the trust was to secure a distribution of the property after the donor's death.

BILL IN EQUITY. Certified to the Supreme Court under Gen. Laws, cap. 289, § 35.

PARKHURST, J. This cause is a suit in equity brought by three of the executors of the will of Frederic Talbot, late of Providence, deceased, for instructions relative to certain trust deeds and to determine the ownership of certain shares of capital stock of the Gorham Manufacturing Company, and of the Silversmiths' Company, formerly owned by the testator.

The cause is before this court on bill, answers, and proofs, having been certified for determination to this court by the Superior Court, under cap. 289, § 35, Gen. Laws, 1909.

The bill names as defendants the beneficiaries of certain deeds of trust, described in the bill, and also the beneficiaries, other than the complainants, of the residuary trust estate created by Frederic Talbot's will. The bill states that upon the death of Frederic Talbot his executors found in his safe-deposit box a certificate for seventy-five shares of the preferred stock of the Gorham Manufacturing Company, and certificates for twenty, ten, ten, and fifty-four shares, respectively, of the stock of the Silversmiths' Company, standing in the name of the testator and unendorsed, and also five instruments in writing, signed by the testator, copies of which are filed with the bill, which purport to declare and create trusts of seventy-five shares of Gorham preferred stock and of twenty, ten, ten, and fifty-four shares of Silversmiths stock, respectively, by conveying the same to trustees to pay the income therefrom to the testator for life, and after his death to the above-named defendants; that the trustees named in said instruments are the complainants and the defendant, Martha Talbot, who also are the trustees named in the residuary clause of the will; that the said trustees, believing said instruments were legally binding upon them and in full force and effect, caused transfers to be made of the said stock to themselves as trustees, and now hold in their possession, in place of the said certificates of stock, certificates

for like amounts in their names as trustees for the respective beneficiaries named in said instruments; that they now desire the opinion of the court as to whether the instruments are valid, and the trusts therein fully constituted, and as to whether they should hold said stock certificates under the trusts of the said instruments or under the residuary trusts of the will.

To this bill certain of the defendants, who are beneficiaries under the will, have filed an answer in which they deny that the testator delivered said certificates or said instruments to either of the trustees named in said instruments for the purpose of constituting a present trust, and allege that it was the intention of the testator that said instruments should not become operative or take effect until after his death. They pray that it may be decreed that the trusts were not fully constituted, and that the said certificates are a part of the residuary trust estate under the will.

Jeannette A. Talbot, C. Elizabeth Todd, Caroline L. Sanborn and Martha Talbot, the defendants who take life interests under said instruments, have also filed an answer to the bill, in which they allege that the testator delivered said certificates, and also delivered said instruments to Martha Talbot, one of the trustees therein named, for the purpose of creating the trusts therein set forth. They pray that it may be decreed that the trustees hold said certificates of stock upon the trusts contained in said instruments.

The material facts admitted in the pleadings or established by uncontradicted evidence are as follows: Frederic Talbot deceased on December 20, 1907. In the winter prior to his decease, he said to his wife, the defendant, Jeannette A. Talbot, that he intended to create for her a trust of seventy-five shares of Gorham preferred stock which would pay her \$450 a year. Later, in the month of February, he produced a trust deed which he had composed and written, himself, and upon objection being made thereto by his son Charles, stated that he would take it to Mr. William R. Tillinghast and "have it made binding." Thereafter, on March 6th, he went to Mr. Tillinghast's office and executed, in his presence as witness, the instrument which is mentioned in paragraph seventh of the bill of

complaint (Complainant's Exhibit F.), and which purports to give, assign, and transfer to the above-mentioned trustees seventy-five shares of Gorham preferred stock, in trust, to pay the income to the grantor during his life, and upon his decease to pay the income to his wife, the respondent, Jeannette A. Talbot. He then came home much pleased, saying, "It is all right now, I have had it made binding," and handed Mrs. Talbot a copy and asked her to read it, which she did, comparing it with the original. Thereafter, on March 12th, he had a long conversation with his daughter, the respondent, Martha Talbot, regarding this trust, explaining to her that he had made this trust deed to give Mrs. Talbot the income of the seventy-five shares for life, and telling her that she and her brothers were the trustees. He then handed the trust deed to her, and said, "There, now, I have given that to you," and upon her asking what she should do with it, he told her to return it to him. He then asked Martha Talbot to call a witness, and in the presence of the witness executed the instrument which is mentioned in paragraph tenth of the bill of complaint. By this instrument the testator purports to sell, assign, and transfer, for value received, unto the said trustees, "seventy-five shares of the capital stock represented by the herewith attached certificates," and to thereby "irrevocably constitute and appoint" the said trustees his attorneys to transfer the said stock on the books of the Gorham Company. After executing this power of attorney, Frederic Talbot went with his wife to the Rhode Island Safe Deposit Company, and deposited the original trust deed and Mrs. Talbot's copy in a safe-deposit box, which stood in the joint names of Frederic Talbot and Martha Talbot, and in which he and Martha kept their valuables. This box originally stood in the joint names of Frederic Talbot and his brother's widow, but in 1904 was transferred to the names of Frederic and Martha Talbot. It remained in their names until Frederic Talbot's death, and still stands in the name of Martha Talbot. Before her name was added, Martha Talbot's papers, certificates, and other valuables were always deposited for her by her father, in this box. Afterwards, having free access to the box, she kept them there herself. She had no

other place to keep them. Mr. Talbot also kept his own valuables there, except such as were deposited in a safe at his home; and also certain possessions of his wife.

In this box Frederic Talbot deposited the aforesaid deed of trust, placing it and a certificate for seventy-five shares of Gorham preferred stock, to which was pinned the above-mentioned power of attorney, in an envelope upon which he wrote "Miss Martha Talbot, 67 Congdon St.," and also "Copy of Trust made to Martha, Fred E., Laurie H., and Ernest D. for Mrs. J. A. Talbot's life, after me 75 shs. Gor. Pfd. of which a copy is directed to her. Another envelope 'Note' the 75 shares Gor. Pfd. stock is also herein enclosed." Mr. Talbot was accustomed to thus address to Martha envelopes which he deposited containing her property. The certificates which were thus deposited had formerly been kept in an envelope upon which Mr. Talbot had written, "This envelope of F. Talbot's contains 75 shares of preferred same." Mr. Talbot now wrote across the "75 shares" the words "withdrawn and put with trust."

Thereafter, in the spring of the same year, Frederic Talbot purchased a certificate for twenty shares of the capital stock of the Silversmiths Company, and told Martha that he was going to make a trust of those shares for his wife, in addition to the other trust. At about the same time he consented to exchange his Gorham common stock for Silversmiths stock, and before leaving the city for the summer arranged with the Gorham Company that he should leave his Gorham certificates, and that the Rhode Island Hospital Trust Company should receive the Silversmiths certificates for him and keep them until his return. During the summer he told Martha that as soon as he got the certificates he was going to have certain trusts made; that he had made a good investment by the exchange, and felt justified in taking the stock to make a trust for her and for Mrs. Talbot. He returned in September, and on September 25th asked Martha to go with him to the trust company to receive the certificates. At the trust company he receipted for the certificates, among which were certificates for the respective amounts of ten, ten, and fifty-four shares. Upon

receiving the latter he gave them separately to Martha. They then deposited them in the above-mentioned safe-deposit box. Thereafter, in October, Frederic Talbot went to a stenographer and had four trust deeds written, using as a form the above-mentioned trust deed of Gorham stock. These four trust deeds are the ones mentioned in the third, fourth, fifth, and sixth paragraphs of the bill of complaint. They purport to transfer and assign the respective shares of Silversmiths stock to the aforesaid trustees upon trust to pay the income to Frederic Talbot for life, and upon his death to the respective beneficiaries for life. These beneficiaries are the respondents, Martha Talbot, Jeannette Talbot, Caroline L. Sanborn, and C. Elizabeth Todd. (Complainant's Exs. B., C., D., and E.). Mr. Talbot returned home with these deeds (not then executed), and told his wife and Martha what he had done and compared them with the first trust deed. He then, on October 12th, asked Martha to "go down town with him and finish up the trust deeds." They went together to the Rhode Island Hospital Trust Company, and there executed the instruments in the presence of Mr. Williams, who witnessed them. As Mr. Talbot received each deed from Mr. Williams, he handed it to Martha, who received it and read it. She then returned them to Mr. Talbot, and they went together to the safe deposit company. Here Mr. Talbot took the certificates of stock out of the safe deposit box, laid them on the table, spread out the deeds of trust and compared them. He then put each certificate and corresponding deed together and gave them to Martha. When he had thus given them all to her, he told her that she was now trustee "with the boys," and further explained the deeds of trust to her.

Martha received these deeds of trust and certificates as trustee, and testifies that her understanding at the time was that her father had made her trustee with her brothers, and that the matter was finished. Frederic Talbot then put the deeds into the above-mentioned envelope addressed to Martha Talbot, and added to what he had previously written thereon, "Also copy of trust made to same during life after me for 20 shares Silversmith; also copy of trust to yourself for 54 shares

of Silversmith; also trust to C. E. Todd and C. L. Sanborn of same." When this was done and he was putting the papers back into the box he seemed much relieved, and said, "Now, that is all finished now. There will be no trouble later on." The deeds and the certificates remained in the deposit box until Mr. Talbot's death, two months later.

It is admitted also that the deeds of trust were in the nature of a voluntary settlement; that all the certificates of stock, to which the deeds could apply, continued to stand in the name of the testator up to the time of his death; that neither of the certificates was endorsed in blank by testator or otherwise; that by the by-laws of the Silversmiths Company and the Gorham Manufacturing Company, the stock certificates were transferable only on the books of the company in person or by attorney on surrender of the certificates; that the deeds in no way identify the certificates to which the trusts relate; no specific shares were indicated either by a recital of the numbers of the certificates, or in whose name they then stood, or in whose possession they then were; nor were any certificates attached or annexed to the deeds of trust; but it appears that the several certificates for the respective amounts of stock named and transferred in the several trust assignments were laid out and placed with the respective assignments thereof; that after the execution of the trust deed relating to the Gorham preferred stock, March 6, 1907, dividends were paid on said stock on April 1st, July 1st, and October 1st, 1907; that all these dividends were paid directly to the testator as before, and deposited by him on his own account in the Blackstone Canal National Bank; that testator deceased December 20th, 1907; that after the execution of the trust deeds relating to the Silversmiths stock, October 12, 1907, the dividend on said stock, due November 15, 1907, was paid directly to the testator as before, and deposited by him on his own account in the Rhode Island Hospital Trust Company; that no one outside of the testator's household knew of the execution of the trust deeds; that the testator's three sons, who were trustees under the deeds, knew nothing about them until after their father's death.

Mr. Talbot placed in the safe deposit box a memorandum

on which he wrote, "Memo, showing whereabouts of securities, &c., of my own, Mrs. T.'s and Martha's, March, 1907." This memorandum, after enumerating the whereabouts of certain articles, adds, "also my will and trust for Mrs. T. life lately created (in March, '07), securing life income of \$7,500." He also deposited in the box another memorandum, which reads as follows:

"Memo.

Prov., March 8, 1907.

"Referring to the Legacies to my Wife as stated in my Will dated Feb. 1, 1901; the amounts named therein are not all I intended to assign. Therefore three years later I gave her ten (10) Shares of Gor. Mfg. Co. Common Stock, the income of which (\$100 per ann.) she has received and invested. In addition to this I have just now created a Trust of the Income of 75 shares of Gorham Mfg. Co. Preferred Stock, during her life after my death.

"The trustees of this are yourselves.

"Affectionately,

"(Signed)

FREDERIC TALBOT.

"To Martha Talbot,

"Fred E. Talbot,

"Laurie H. Talbot,

"Ernest DeW. Talbot.

"Memo.

October, 1907.

"The above-named shares of the Gor. Com. Stock having been exchanged for the Silversmiths Co. Stock at a premium, Mrs. Talbot has received 21 shares of that in lieu of the Gor. Common.

"In addition to this I have now created another trust, giving her the income, during her life, of 20 Shares more of the Silversmiths Co. after my death.

"This makes up a fair share of income of the whole estate.

"(Signed)

FREDERIC TALBOT."

Mr. Talbot, also, on October 14, 1907, wrote in a letter addressed to his wife, "I have created trusts for my daughter and sons to pay you the income of 75 shares, \$7,500, Gorham Manufacturing preferred stock, and income of 20 shares, \$2,000, of Silversmiths' stock during your life."

After Frederic Talbot's death the above-mentioned certificates for seventy-five shares of Gorham preferred stock were transferred to and now stand in the names of "Martha Talbot, Frederic E. Talbot, Laurie H. Talbot and Ernest D. Talbot, trustees under the trust deed of Frederic Talbot," and the certificates for the twenty, ten, ten, and fifty-four shares of Silver-smiths stock were transferred to and now stand in the names of the said Martha, Frederic, Laurie and Ernest, trustees for Jeannette A. Talbot, Caroline L. Sanborn, C. Elizabeth Todd, and Martha Talbot, respectively. Since then the trustees have received the dividends from this stock and have paid to the beneficiaries, out of the estate, by agreement, an amount equal to the dividends thus received.

The will of Frederic Talbot devises and bequeaths all the residue of his estate, after payment of certain bequests, to Martha Talbot, Frederic E. Talbot, Laurie H. Talbot, and Ernest DeW. Talbot, upon trust to pay the net income therefrom to his children or issue during a period for ten years, from the testator's death, or during such longer period as a majority of said children at the end of ten years shall determine and shall declare by a certificate in writing filed in the Municipal Court. The will, after making provision for widows of deceased sons, further provides that, at the end of said ten years or longer period, the trustees shall stand seized of the trust estate for the issue of the testator's four children, and, in default of issue, for his heirs at law.

Two of the complainants have children and a third is married. The defendant, Martha Talbot, is unmarried.

Upon these facts the question before the court is whether Frederic Talbot created valid trusts of these stocks.

It is contended by counsel for the complainants and for certain respondents, who are interested, by virtue of the residuary provisions of the will, adversary to the interests of the beneficiaries under the specific trusts created or attempted to be created under the five several instruments of assignment and transfer of these five several groups of corporate stocks, that it was the manifest intention of Frederic Talbot to create an active trust in the persons named in the instruments as

trustees, and that said instruments can in no way be construed as importing any intention on his part to make himself a trustee as by a declaration of trust; and this contention is not disputed by any party.

And it is further contended that the settlor did not do all that was necessary to be done in order to transfer the stock, to divest himself of all interest therein, and to create *in præsenti* the relation of trustee and *cestui*; that, the settlement being voluntary and the trust incomplete, equity will not enforce it, nor aid in perfecting it; and that the circumstances indicate a purpose on the part of the settlor to make a testamentary disposition of the stock.

In support of the above contentions, that the settlor did not do all that was necessary to be done in order to transfer the stock, to divest himself of all interest therein and to create *in præsenti* the relation of trustee and *cestui que trust*, and that, the settlement being voluntary and the trust incomplete, equity will not enforce it, nor aid in perfecting it, counsel cites and relies upon the case of *Milroy v. Lord*, 4 De. G. F. & J. 264 (1862). There a settlor by a deed poll conveyed and transferred "fifty shares of the capital stock of the Bank of Louisiana, now standing in my name in the books of the said bank, together with the certificates or scrip thereof, numbered 3,457 and dated the 6th of March 1852," to Samuel Lord, "in trust to collect and receive the dividends and profits of the said stock, and apply them to the use and benefit" of Eleanor Milroy. Lord accepted the trust, signed the deed, held the certificates of stock, collected the dividends and paid them to the beneficiary. Lord also had a general power of attorney from the settlor to transfer the shares of stock, but no transfer upon the corporate books was ever made, nor was the old certificate ever surrendered to the corporation, nor any new certificate issued to the trustee. After the death of the settlor, upon a bill to recover the stock, it was held that the voluntary settlement was not perfected. Counsel claims that this case is directly in point, and quotes from the opinion of Lord Justice Turner, as follows (p. 274): "I take the law of this court to be well settled, that in order to render a voluntary settlement valid

and effectual the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds in trust for those purposes; and, if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried."

This is the only English case cited (save one) wherein the transfer of corporate stock is dealt with; and it appears to settle the English law to the effect that, in order to make a trust settlement of corporate stocks complete and effectual, although the shares of stock have been actually assigned to the trustee and the certificates handed over to him, and he has collected the dividends thereon and paid them over to the *cestui que trust*, yet the trustee must also have surrendered the certificates to the corporation and must have had the shares transferred to and registered in his name as trustee on the books of the corporation, and must have taken out new certificates in his own name as trustee.

In the case of *Heartley v. Nicholson*, 19 L. R. Eq. 233, 242, cited by complainants' counsel, which approves the doctrine of *Milroy v. Lord* (*supra*), it appeared that a testator, by letters and other acts, expressed a desire and intention that the plain-

tiff should have certain shares of stock as her property, but failed to carry out his intention by making any actual transfer in his lifetime; and that he never had made any declaration of trust, and that the circumstances did not amount to proof of an intention and determination on his part that he would hold the shares which he had meant to transfer to the plaintiff in trust for her.

The other English cases cited by the counsel for the complainants on this point, while they approve and follow the general doctrine of *Milroy v. Lord*, have no relation to transfers of corporate stocks. *Richards v. Delbridge*, L. R. 18 Eq. 11, related to an attempted gift of a leasehold interest and stock in trade by means of a mere memorandum endorsed upon the lease: "This deed and all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to E's mother on his behalf; and it was held that there was no valid declaration of trust in the property in favor of E. *Warriner v. Rogers*, L. R. 16 Eq. 340, related to an attempted gift of a box and contents, with a note inside not read by the donee (plaintiff); the donor kept the key of the box and told the donee not to open it till after her death. She afterwards made her will, whereby she gave the residue of her real and personal estate to the defendant, a stranger in blood. After her death the box was opened and found to contain a paper writing dated and signed by testatrix, and addressed to the plaintiff, to the effect that the contents of the box were a deed of gift to the plaintiff of certain real and personal estate therein specified and described, &c., &c. It was held that the papers were of a testamentary character and did not amount to a valid declaration of trust in favor of the plaintiff. *In re Breton's Est.* L. R. 17 Ch. D. 416, related to a supposed gift, to a wife, of furniture, &c., where the evidence offered to support the gift consisted of three letters of the husband to the wife, purporting to give her furniture, plate, &c., without any delivery of the chattels, which were a part of their household furniture, and always used by them in common in the ordinary ways; it was held that there was no completed gift. These cases refer to *Milroy v. Lord*, *supra*, and rest upon the general doctrine

therein set forth, but have no special bearing upon the case at bar.

The general doctrine, as applied to incomplete or executory settlements in trust, set forth in *Milroy v. Lord*, *supra*, was cited with approval in the case of *Paine v. Paine*, 28 R. I. 309, 310; in that case it appeared that the complainant's father had at one time, just after the plaintiff attained his majority, written to him a letter, in which he said, "Your mother's stock in the Akerman Company I have retained in such manner that the income goes to me, but so that neither your creditors can get it if you meet with disaster—nor can my creditors touch it if I am unsuccessful;" that thereupon, on the same day, the father transferred certain shares of stock in the Akerman Company, which had been the individual property of complainant's mother, so that they stood upon the books of the company as follows: "George T. Paine, Atty. for W. H. Paine." But no certificate of the same was ever issued to the complainant (W. H. Paine), and he had no knowledge that the stock had ever been so transferred till after his father's death. Later on, George T. Paine made other transfers of the same stock, so that for several years prior to and at his death it stood in his own name; and meanwhile he always voted on the stock and collected the dividends thereon and applied them to his own use. It further appears that, several years prior to his death, an estrangement occurred between father and son, and that the father wrote to his son as follows: "I have no funds of any kinds in my hands belonging to you in trust or that have accumulated for your benefit from your mother's estate." It was perfectly plain, therefore, that no trust in the stock of the Akerman Company had ever been created by the father in favor of his son, and the bill to establish such a trust was properly dismissed. It is also quite evident that the approval by this court of the general doctrine of *Milroy v. Lord*, *supra*, falls far short of an approval of its application to the state of facts set forth in *Milroy v. Lord*, and furnishes no argument for its application to the facts of the present case.

- (1) The complainant's counsel cites no cases from the courts of this country where the doctrine of *Milroy v. Lord*, *supra*, has

been supported and followed, to its fullest extent; and we have found no such cases cited in any of the elaborate briefs submitted in behalf of the other parties. The general principle of all the cases, both English and American, is unquestionably the same, that in order to create a valid, voluntary trust *inter vivos*, where the donor is not trustee, there must be an intent to make a present transfer of ownership upon trust, and the donor or settlor must do everything that, according to the nature of the property, is necessary to execute that intent. And this rule is well stated and fully recognized in *Peoples Savings Bank v. Webb*, 21 R. I. 218, 219, where the rule is thus stated: "The underlying question, both in trusts and gifts, is the intention and act of the donor. Hence we find the same general rule in both classes of cases. There must be a present intent to make a trust or gift at the time; there must be an execution of the intent by some act, such as delivery of the evidence of title, or a notice and acceptance of the trust, and the intent and act must be such as to give a present right or benefit to the donee." And see *Paine v. Paine*, 28 R. I. 307, 309, *supra*. And in *Stone v. Hackett*, 12 Gray, 227, 230, Judge Bigelow states the same general rule as follows: "The key to the solution of

(2) the question raised in this case is to be found in the equitable principle, now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons, except creditors or *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery."

From these authorities it is evident that we must first determine the question of fact whether Frederic Talbot intended to make a present transfer of the Gorham and Silver-smiths stock to the trustees. We must then determine the question of law whether what he did was all that was necessary to transfer the ownership of shares of stock. We will consider these questions separately.

At this point it is important to consider the exact form in which the five assignments to the trustees were made:—the assignment of the Gorham preferred stock is as follows:

“(Complainants’ Exhibit F.)

“KNOW ALL MEN BY THESE PRESENTS:

“That I, Frederic Talbot, of the city of Providence, and State of Rhode Island, in consideration of the sum of one dollar to me paid by Martha Talbot, Frederic E. Talbot, Laurie H. Talbot and Ernest D. Talbot, all of said Providence, the receipt whereof is hereby acknowledged, and of the trusts hereinafter contained, have given, assigned and transferred and by these presents do give, assign and transfer unto them, the said Martha Talbot, Frederic E. Talbot, Laurie H. Talbot and Ernest D. Talbot, in trust as hereinafter provided:

“Seventy-five (75) shares of the preferred capital stock of the Gorham Manufacturing Company of said Providence:

“TO HAVE AND TO HOLD the said shares of stock unto them, the said Martha Talbot, Frederic E. Talbot, Laurie H. Talbot and Ernest D. Talbot, and the survivors and survivor of them and other the trustee or trustees who may at any time be appointed to carry out the trusts hereunder, all hereinafter referred to as my said trustees, in trust to hold said shares of stock and collect all the income and dividends thereof and after paying therefrom any taxes or other public charges and any necessary expenses of carrying out these trusts, to pay the residue thereof, hereinafter called the net income, to me, the said Frederic Talbot as often as any dividends are declared upon said stock, during my life; and from and after my decease to pay said income in manner aforesaid to my wife Jeannette A. Talbot, during her life; but if my said wife should die before me, then all the trusts hereinunder shall cease and determine and

said shares of stock shall revert and be reassigned and transferred to me as my absolute property; and upon the death of my said wife, if she shall survive me, in further trust to hold said shares of stock subject to and as a part of the trust property subject to any trusts of the residue of my estate created by my last will and testament, if any such trusts shall so long continue; and if at that time the trusts of the residuary estate under my said will shall have terminated or if for any other reason no such trusts shall then be in force, then to divide said shares of stock equally between my four children, the said Martha Talbot, Frederic E. Talbot, Laurie H. Talbot and Ernest D. Talbot, as their own absolute property. Provided, however, and I hereby expressly reserve to myself the power during my life by any writing under my hand delivered to said trustees or the survivors or survivor of them, to revoke this instrument and all the trusts hereunder whereupon said shares of stock shall revert and be retransferred to me as my absolute property; and I also expressly reserve the right to modify or change the trusts and limitations hereunder in any manner I see fit:

"And I hereby grant to my said trustees power to sell said shares of stock and my reinvestments thereof and reinvest the proceeds thereof in good income producing securities, and no purchaser shall be required to see to the application of the purchase moneys; provided, however, no such sale shall be made during my life without my consent in writing, and provided further, and I hereby reserve the right during my life to direct in writing my said trustees to sell said shares or any reinvestment thereof and to invest the proceeds in other securities to be then named by me.

"IN TESTIMONY WHEREOF, I have hereunto set my hand this Sixth day of March, A. D. 1907.

"FREDERIC TALBOT.

"Executed in the presence of,

"WM. R. TILLINGHAST,

"ARTHUR A. THOMAS."

The four trust assignments of the Silversmiths Co. stock were in precisely the same form, but dated October 12, 1907.

It is evident from the reading of these assignments, and from

the foregoing statement of facts, that Frederic Talbot intended to create trusts of the Gorham and Silversmiths stocks. The sole question of intention is whether he intended to create them by a conveyance *in præsenti* or *in futuro*.

The provisions of the trust instruments show that Frederic Talbot intended the trusts to come into existence at some period during his lifetime. These instruments provide that the trustees pay the net income to Frederic Talbot for life, and, after his death, to his wife for life. They further provide that, in the event of the prior decease of his wife, the stock shall revert to him, and also that during his lifetime he may revoke the instruments and all trusts thereunder, or may change or modify the trusts, and that no sale shall be made, during his life, without his consent. These provisions are not consistent with an intention to make a testamentary disposition.

The question then arises, at what period of his life did he intend the trusts to come into existence? The facts, which are stated in detail above, show that he had done everything that he thought necessary to create the trusts, and intended that they should be completely constituted by means of and upon the delivery to the trustees of the certificates and of the assignments.

We will first consider the facts as to the trust for seventy-five shares of Gorham preferred stock. The most important of these facts are the following: Frederic Talbot declared to his wife his intention of making a trust for her of this stock, and drafted an instrument for that purpose. Later he became dissatisfied with this instrument, and went to a lawyer to "have it made binding," as he expressed it. He returned, bringing with him the trust instrument (Complainant's Ex. F.), which he had executed in the presence of two witnesses, which purports to give, assign, and transfer this stock to the trustees. He was much pleased, and said, "It is all right now, I have had it made binding," and gave Mrs. Talbot a copy, which they compared with the original. Thereafter he explained the matter fully to his daughter, Martha, stating that he had made the trust deed to give the income from the Gorham stock to his wife for life, and that Martha was one of the trustees with her brothers.

He then handed the instrument to her, saying, "There, now, I have given that to you." He also wrote out a power of attorney to transfer this stock upon the books of the company, which he executed in the presence of a witness. He then went to the safe-deposit box, withdrew the certificates for seventy-five shares from an envelope containing his own stock, made a memorandum on the envelope that they were "withdrawn and put with trust," and pinned the certificates to the power of attorney. These he placed with the assignment in an envelope, which he addressed to Martha, and on the outside endorsed a memorandum that it contained the "trust" and the certificates. He was accustomed thus to address envelopes in which he deposited Martha's property. This envelope he deposited in the safe deposit box, which stood in their joint names and to which Martha had access. He was accustomed to deposit Martha's valuables in this box for her. He then made and deposited in said box a memorandum, addressed to said trustees, that he had "just now created a trust" of this stock for his wife "during her life after my death;" and he also declared in another memorandum, and in a letter written to his wife, that he "had created" this trust for her life. These facts show that he intended to make a present delivery of these instruments and certificates. His declarations of intention to create the trust, and later his declarations that he had created it, show such intent. Thus in *Atkinson, Petitioner*, 16 R. I. 413, the creator of certain trusts, who was himself trustee, declared to the beneficiaries that he had made deposits for them, and that the money would be theirs at his death. The court said: "The declaration of the trustee to the beneficiaries as above stated shows that he understood it to be completely constituted." The declaration in the present case, that Frederic Talbot had "just now created a trust of the income . . . during her life after my death" shows clearly that he "understood it to be completely constituted." So also in *Hani v. Germania Life Ins Co.*, 197 Pa. St. 276, 278, an intention to deliver was gathered from declarations of intention before handing over, and from subsequent declarations, that the grantor had given the property. The evident desire of Frederic Talbot to make the instrument immediately bind-

ing, coupled with his acts of delivery, also indicate such intent; as do the facts that he took the trouble to execute a power of attorney and to explain the trust deed to Martha before giving it to her, and that upon giving it to her he used the significant words of delivery, "There, now, I have given that to you." That he intended also to deliver the certificates is shown by the fact that he withdrew them from his own property and placed them in the envelope addressed to Martha, together with the instrument which he had already given to her and the power of attorney. When we consider that he had already handed to her the deed of assignment of this stock, which he put with the certificates; that in depositing the certificates in an envelope so addressed he was following his usual custom in depositing Martha's property; and that the box in which they were deposited stood in her name and was the place where she kept all her valuables, the intent to deliver is apparent. See *Gilkinson v. Third Ave. R. R. Co.*, 47 N. Y. App. Div. 472, where the question was whether stock certificates had been delivered to an alleged donee. The donor had procured a safe-deposit box, placed the certificates in it, and given a key to the donee, keeping one himself. The court held that this showed an intent to make a delivery of the certificates and that the delivery was valid. See also *Reed v. Copeland*, 50 Conn. 472, 476, 487; *Devol v. Dye*, 123 Ind. 321; *Candee v. Conn. Savings Bank*, 81 Conn. 372.

The important facts relating to the Silversmiths stock are as follows: Mr. Talbot, after acquiring these shares, declared his intention of creating these trusts. In the spring of 1907 he bought twenty shares, and, later in the same year, upon conversion of this Gorham stock, received, among others, certificates for ten, ten, and fifty-four shares. These certificates he gave separately to Martha, and they deposited them in the safe-deposit box. Thereafter he had the assignments made, and executed each of them before a witness and handed each to Martha. They then went to the safe-deposit company, where Mr. Talbot took out the certificates, put the corresponding assignments and certificates together and gave them separately to Martha, carefully explaining them. He then

put the assignments into the above-mentioned envelope, addressed to Martha, and made further note thereon that it now contained copies of these trusts. When he had done this, he told her that she was now trustee "with the boys," that it was all finished now, and there would be no trouble later on. Martha received these assignments and certificates as trustee, and testifies that her understanding was that her father had made her trustee with her brothers. Thereafter he added to the above memorandum the words: "In addition to this I have now created another trust giving her the income, during her life, of 20 shares more of the Silversmiths' Co. after my death." And in a letter to Mrs. Talbot he again stated that he "had created" these trusts. Upon these facts it is clear that he also intended to create trusts of this stock by a present delivery of the certificates and instruments. Here again are declarations of intent to create, and of the fact of creation. His intent is also shown by the separation of these certificates from his others, and the delivery to Martha. It is also shown by the fact that he had assignments made for them and upon execution handed each to Martha; that later, after careful explanation, he put the corresponding certificates and assignments together and handed them to her, and that he put the assignments into her envelope. See *Bank v. Holland*, 99 Va. 495; *Larimer v. Beardsley*, 130 Ia. 706.

The complainants and certain beneficiaries under Frederic Talbot's will contend, however, that he did not intend a present delivery because he did not endorse the certificates, because he received the dividends after the trusts were created, and because he did not inform the other trustees of the trusts. These facts, however, are not inconsistent with an intent to make a present delivery. Under some circumstances they might be evidence of an intent to retain the property, but not upon the facts of the present case. Thus the lack of endorsement does not show such intent, since an endorsement is not necessary to make trustees owners of stock. The printed form

(3) of transfer, with power of attorney, commonly placed upon the back of a stock certificate, furnishes a convenient and appropriate means of transfer in the ordinary course of business;

but it is by no means the only way in which a transfer of stock may be made. A transfer of ownership may be made by a delivery of unendorsed certificates, together with specific assignments, as well as by delivery of endorsed certificates. And where stocks are to be transferred upon express trusts, as here, it is certainly more convenient and orderly that such transfers should be made by separate specific assignments in trust, so that the trusts may be fully set forth. The fact that he did not attempt to transfer ownership by delivery of endorsed certificates is not evidence that he did not intend to do so by delivery of unendorsed certificates.

Again, as regards the receipt of dividends. The fact that he received the dividend checks directly from the companies, after delivery of the certificates and assignments, during the short period before his death, resulted solely from the fact that no transfer had been made upon the books by the trustees. Since by the terms of the trusts themselves he was to receive the dividends during his life, it was immaterial whether he received them from the trustees or from the companies. Had he sought to create the trusts without executing the trust instruments, or delivering the certificates, or if, by the terms of the trusts, others were to receive the dividends during his life, the receipt of dividends from the company by himself would be evidence that he did not regard the settlement as complete. The authorities hold, however, that, where a settlor reserves a life interest, the receipt of dividends or use of the trust property is not inconsistent with an intention to create
(4) a present trust. See *Stone v. Hackett*, 12 Gray, 227; *Candee v. Conn. Savings Bank*, 81 Conn. 372; *Bank v. Holland*, 99 Va. 495; *Larimer v. Beardsley*, 130 Ia. 706; *Hackett v. Mozley*, 65 Vt. 71; *Reed v. Copeland*, 50 Conn. 472; *McNally v. McAndrew*, 98 Wis. 62.

Furthermore, the fact that he did not inform the other trustees loses whatever significance it might otherwise have had when we consider that the other trustees were not beneficiaries, and that the one trustee who was a beneficiary was informed with the greatest care, and understood and accepted the trust. Frederic Talbot also informed his wife, another

beneficiary, and gave her a copy of the instrument in her favor. His sons had no beneficial interest in the trust, were busy, were seldom consulted by their father, and did not live at home. Frederic Talbot was of advanced years, and executed the trusts shortly before his death. Whether he intended Martha to inform the other trustees, or whether he intended to do so himself, we can only conjecture. It is clear that in any event he intended them to learn of the trusts, for he addressed to them a memorandum that he had created the trusts. In view of the full information which he gave the trustee beneficially interested in the trust, it is of little importance that he failed to inform immediately the other trustees, who had no beneficial interest, especially as notice to the other trustees, or delivery to them or acceptance by them was not necessary to the creation of a complete trust. Thornton, Gifts and Advancements, § 426; 28 Am. & Eng. Enc. of Law, 896, (d) and cas. cit; *Fletcher v. Fletcher*, 4 Hare. 74; *Minot v. Tilton*, 64 N. H. 371, 375; *Cloud v. Calhoun*, 10 Rich. Eq. (S. C.) 358, 362; *Adams v. Adams*, 21 Wall. 185.

- (5) In determining this question of intention, the facts should be construed as strongly as possible in favor of the trusts. The purpose of the testator to benefit these defendants, being undisputed, should be given effect to in the absence of clear evidence that he did not intend to do so by present trusts. See *Devol v. Dye*, 123 Ind. 321, 328 (*supra*); *Otis v. Beckwith*, 49 Ill. 121, 135; *Bond v. Bunting*, 78 Pa. St. 210, 219.

Especially is this a case meriting the application of this rule, since a failure of the trusts will defeat the provision which Mr. Talbot intended to make for his wife and for his daughter Martha, and for the other beneficiaries during their lives. It will also deprive his daughter, Martha, of her remainder interest in the stocks included in the other trusts.

It is shown beyond a doubt, by the above recited facts, that Frederic Talbot intended to transfer the shares of stock by making a present delivery of the certificates and assignments to the trustees. It remains to consider, first, whether his acts in execution of this intent amounted to a legal delivery of the certificates and assignments to the trustees; and, second,

whether a legal delivery to the trustees, with such intent, of unendorsed certificates and assignments, without transfer on the books of the company, is all that is necessary for a transfer of ownership of shares of stock. With the intent, just considered, of making a present delivery, he did the following acts: He handed the assignment of the seventy-five shares of Gorham stock to Martha; he separated the certificate for these shares from his own stock and placed it with the assignment in an envelope, addressed to Martha, which he deposited, according to his custom in depositing her property, in a safe-deposit box, which stood in their joint names; he also handed to her the several certificates and several assignments for the respective number of shares of the Silversmiths stock; and these were likewise deposited in the same box. In the case of the assignments and of the Silversmiths certificates there was a manual delivery to Martha. In the case of the Gorham certificate there was also a delivery to her by the deposit among her possessions. See *Gilkinson v. Third Ave. R. R. Co.*, 47 N. Y. App. Div. 472 (*supra*), where it was held that a deposit of stock certificates in a safe-deposit box, to which both the donor and donee had access, was a valid delivery. And see *Reed v. Copeland*, 50 Conn. 472 (*supra*); *Devol v. Dye*, 123 Ind. 321 (*supra*); *Candee* (6) *v. Conn. Savings Bank*, 81 Conn. 372 (*supra*); *Martin v. Flaharty*, 13 Mont. 96. In this connection the fact is not of importance that after delivering the assignment of the seventy-five shares to Martha she handed it back, since a delivery is not defeated by a return of the instrument to the donor. *Stone v. King*, 7 R. I. 358; *Grover v. Grover*, 24 Pick. 261; *Royston v. McCulley*, 52 L. R. A. 899 (Tenn.); *McNally v. McAndrew*, 98 Wis. 62; *Larimer v. Beardsley*, 130 Ia. 706, 709; 14 Am. & (7) Eng. Ency. Law, 1026, 1027. And the power of revocation contained in the assignments does not, of course, affect the validity of the delivery or of the trusts thereby created. *Stone v. Hackett*, 12 Gray, 227; *Van Cott v. Prentice*, 104 N. Y. 45; *Keyes v. Carleton*, 141 Mass. 45, 49.

These several deliveries to Martha as trustee were sufficient to create in each instance a completed trust *in præsenti*, although there was at that time no delivery to the other trustees

and they were not notified of the creation of the trusts until (8) after the donor's death. "In general, delivery to and acceptance by the trustee, or even knowledge of the trust on his part, are not essential to the validity of the trust as against the settlor, and the fact that the trustee declines to execute the trust does not defeat it or affect the rights of beneficiaries." 28 Am. & Eng. Enc. of Law, p. 896, d. and cases cited. *Fletcher v. Fletcher*, 4 Hare, 74; *Minot v. Tilton*, 64 N. H. 371, 375; *Cloud v. Calhoun*, 10 Rich. Eq. (S. C.), 358, 362, and cases *infra*. And in case the trustee refuses to accept or execute the trust, the court will appoint a new trustee or trustees for that purpose. *Adams v. Adams*, 21 Wall. 185; *Stone v. King*, 7 R. I. 358; *King v. Donnelly*, 5 Paige (N. Y.), 46. See also Thornton on Gifts and Advancements, § 426; Devlin on Deeds, § 260. And it is to be noted here that the three other trustees, upon being notified of these trusts after their father's death, did not decline to accept or refuse to execute the trusts, but forthwith proceeded to have the several blocks of stock transferred to their own names as trustees, surrendering the old certificates and taking out new ones in their names as trustees, which they have ever since held.

There can be no doubt, under the course of decisions in this country, that the delivery of the certificates of stock, together with the assignments thereof in trust to the trustees, as hereinbefore set forth, was all that was necessary to be done by the (9) donor to transfer the ownership of the shares of stock. Shares of corporate stock are *choses in action*, or in the nature of *choses in action*, as was recognized in this State in *Arnold v. Ruggles*, 1 R. I. 165, 174; *Dyer v. Osborne*, 11 R. I. 321, 326; and see other cases *infra*. The certificates are the evidence representing the *choses in action*. *Burrall v. Bushwick, R. R. Co.*, 75 N. Y. 211; *Commonwealth v. Crompton*, 137 Pa. St. 138; *Leyson v. Davis*, 17 Mont. 220.

The question to be determined is whether a delivery of such evidence of title with a written assignment, but without endorsement and without registration, constitutes a valid gift. In *Tillinghast v. Wheaton*, 8 R. I. 536, the court was asked to determine whether a delivery of a savings bank book, with

words of gift, constituted a valid gift *causa mortis* of the deposit evidenced by the bank book. In holding the gift valid, Judge Duffee said, p. 541: "It has been uniformly held that bank notes, notes payable to bearer, and other securities and evidence of indebtedment, which are transferable by mere delivery, may pass as gifts *mortis causa*; but in *Miller v. Miller*, 3 P. Wms. 356, it was decided that a note of hand, not payable to bearer, and being a mere chose in action to be sued in the name of the executor, was not the subject of a *donatio causa mortis*. In *Ward v. Turner*, 2 Ves. Sen. 431, it was held by Lord Hardwicke that a gift of receipts for South Sea Annuities was not a good *donatio causa mortis*, principally because the property did not pass by a delivery of the receipts, but a transfer was necessary, which was not made. The doctrine of these decisions has been recognized and approved in other English and in some American cases. . . . But in the more recent English decisions the strictness of the ancient rule has been much relaxed, and it is stated by Mr. Redfield, who seems to have had access to all the later cases, that it is 'now fully settled in the English courts that not only are all securities which pass by delivery or by endorsement, when endorsed in blank, the subjects for a valid gift *mortis causa*, but that, even promissory notes and bills not negotiated so as to pass by delivery, and also promissory notes not negotiable, bonds, mortgages, policies of insurance, and all other evidences of indebtedness which may be regarded as representing the debt, may, by a parol gift, and the delivery of the paper by which the debt is evidenced, either with or without written assignment or endorsement, constitute a good gift *mortis causa*.' 2 Redfield on Wills, pp. 312, 313, and cases there cited. The rule thus deduced from the English authorities has been repeatedly recognized and applied by the American courts." This case, which is widely cited, is affirmed in *Prov. Inst. for Savings v. Taft*, 14 R. I. 502. There a depositor in the plaintiff bank owned two deposits,—one in his own name and one in the name of his sister. These deposits were evidenced by bank books which were in the custody of the depositor's mother. The depositor declared to his mother that he gave her the two books, and left them in her possession. The

court held that there had been a valid gift *inter vivos* of the money on deposit.

In *Hopkins v. Manchester*, 16 R. I. 663, the question was whether a delivery of an unendorsed promissory note constituted a valid gift *inter vivos*. The court of Common Pleas held that such a note would not pass by delivery, without endorsement, as a gift *inter vivos*, though it might as a gift *causa mortis*. This decision was overruled upon exception. The court said, p. 664: "The modern cases hold that such a note or at least the beneficial interest in such a note, will pass by gift, without indorsement, so as to entitle the donee to collect the money due on it for himself, and, if need be, to sue on it for himself, in the name of the donor, or of the donor's legal representative. We do not find that the cases distinguish in this respect between gifts *inter vivos* and gifts *causa mortis*, though it may be that, in a doubtful case, the jury would regard the want of an indorsement with more suspicion if the gift were *inter vivos* than if it were *causa mortis*."

We are of the opinion that the principle of these cases, that the delivery of the instrument which is the evidence representing a *chose in action*, constitutes a valid gift, should be applied to the delivery of a certificate of stock. Although the question has not heretofore been determined in Rhode Island, the decisions in other jurisdictions of this country are almost unanimous in holding that such delivery, either with or without written assignment or endorsement, and without registration on the books of the corporation as required by its by-laws and certificates, constitutes a valid gift,—whether it be to trustees or directly to the beneficiaries, and whether it be *inter vivos* or *mortis causa*. And it is even held that a delivery of an assignment without delivery of the certificate and without registration constitutes such a gift. The following are examples of these decisions: 1. Delivery of certificate without endorsement and without assignment. *Leyson v. Davis*, 17 Mont. 220 (*supra*); *Commonwealth v. Crompton*, 137 Pa. St. 138; *Bank v. Holland*, 99 Va. 495 (*supra*); *Bond v. Bean*, 72 N. H. 444; *Denunzio's Receiver v. Scholtz*, 117 Ky. 182; *Curtis v. Crossley*, 59 N. J. Eq. 358; *Brown v. Crafts*, 98 Me. 40, 44, 45

(*supra*); *Gilkinson v. Third Ave. R. R. Co.*, 47 N. Y. App. Div. 472 (*supra*); *Reed v. Copeland*, 50 Conn. 472. 2. Delivery of certificate with assignment. *Larimer v. Beardsley*, 130 Ia. 706, 709 (*supra*); *Stone v. Hackett*, 12 Gray. (Mass.) 227 (*supra*); *Masury v. Arkansas Nat. Bank*, 93 Fed. Rep. 603. 3. Delivery of assignment without delivery of certificate. *Grymes v. Hone*, 49 N. Y. 17; *Curtis v. Crossley*, 59 N. J. Eq. 358, 362; *Lowell*, Transfer of Stock, 44. And see *Hani v. Germania L. Ins. Co.*, 197 Pa. St. 276, 279; *Bond v. Bunting*, 78 Pa. St. 210; *Candee v. Conn. Savings Bank*, 81 Conn. 372 (*supra*); *Otis v. Beckwith*, 49 Ill. 121; *Cowen v. National Bank*, 94 Tex. 547; *Elam v. Keen*, 4 Leigh (Va.) 358.

The principle underlying these decisions is that the delivery of the certificates or assignments makes the donee substantially *dominus* of the shares, since he needs no further assistance from the donor and can compel registration by the corporation. Such delivery is all that is required to pass an ownership or equitable title to the donee, and in enforcing such title, equity is not aiding a volunteer to perfect an imperfect title, but is enforcing this title, which the donor by his delivery has already perfected. The donor is still the legal owner of the shares, since they stand in his name on the books of the corporation. As in the case of any other non-negotiable chose in action, this legal title can only pass by the recognition by the debtor of the transferee, *i. e.* by novation. The beneficial or equitable title, however, in each such case may be assigned without novation, and will be enforced regardless of the requirement of registration on the books of the corporation. Such requirement is solely for the benefit of the corporation and has nothing to do with the transfer of the equitable title. The transfer on the books is in reality nothing but a novation. In *Commonwealth v. Crompton*, 137 Pa. St. 138, 148, (*supra*), this principle is thus expressed: "The shares of stock are choses in action, and the certificates evidence of the title to them: *Slaymaker v. Bank*, 10 Pa. 373. Why may not a delivery of the certificates, coupled with words of absolute and present gift, invest the donee with an equitable title to the stock which the donor or a volunteer cannot successfully assail?"

A stockholder may clothe another with the complete equitable title to his stock without compliance with the forms printed by the corporation."

In *Bank v. Holland*, 99 Va. 495, 501 (*supra*), it is said: "It is well settled by the modern authorities that choses in action not negotiable, and negotiable paper not endorsed, may be the subject of a gift, and that a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. The delivery therefore of a certificate of stock, unendorsed, by the donor to the donee with intent to transfer title by way of gift, is effectual as an equitable assignment, although no legal title passes for want of an endorsement and transfer on the books of the bank." . . . "We hold, therefore, that it was not indispensable to the validity of the transfer of the stock in question that there should have been any endorsement on the certificate, or transfer on the books of the bank; that the delivery of the certificate, without endorsement by John W. Holland to his wife with intent to give her the stock, vested in Mrs. Holland the complete equitable title, and divested her husband of all present control and dominion over the same."

In *Larimer v. Beardsley*, 130 Ia. 706, 709 (*supra*), the court said: "It is suggested in argument that the certificate could be transferred only on the books of the bank, but this is true only with reference to the question as to who was a stockholder in the bank. See Rev. St. U. S. Section 315 (U. S. Comp. St. 1901, p. 2054). Certainly there is no question as to the right of the owner of shares of stock in a national bank to transfer a legal or equitable right to such shares, although they remain in his name on the books of the bank."

In *Bond v. Bean*, 72 N. H. 444, 446 (*supra*), the court said: "The delivery of the stock with an intent to make a completed gift and its acceptance by the donee, vested in her the equitable title to the property. The fact that the certificate was not endorsed did not render the gift incomplete as a matter of law."

In *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, the court said: "Such by-laws do not incapacitate the shareholder from parting with his interest."

In *Stone v. Hackett*, 12 Gray, 227, 231, where there was no transfer of shares of railroad stock on the books of the corporation, but certificates handed over to trustee, with endorsement in blank, the court says, at p. 231: "The conveyance or transfer of the shares to the plaintiff in her capacity as trustee was full and complete and vested in her the legal title to the property. No further act was to be done by the original owner of the shares to consummate the plaintiff's title. As between the parties, the delivery of the certificates of stock, with the assignments of some of them and the power of attorney to transfer the others, was equivalent to a complete executed transfer of the shares. Nor is it at all material to the validity of the plaintiff's title, that transfers of the shares had not been recorded in the books of the different corporations and new certificates of stock taken out by her. That was not necessary to the conveyance of the legal title as between the donor and the plaintiff. This is well settled by the authorities in this state. *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476; *Ellis v. Essex Merrimack Bridge*, 2 Pick. 248; *Sargent v. Franklin Ins. Co.*, 8 Pick. 96; *Eames v. Wheeler*, 19 Pick. 444."

In Thompson, Corporations (1st ed.) § 2390, the author says: ". . . It has been often held that a valid gift of *non-negotiable securities* may be made by the delivery of them to the donee, without an assignment or indorsement in writing. This principle has been applied to notes, bonds, stocks, certificates of deposit, and life insurance policies. Shares of stock, as elsewhere seen, are regarded for many purposes as *choses in action*, and the certificates as evidence of the title of the holder to them. It has therefore been held that a stockholder may clothe another with a complete equitable title to his shares by a *delivery* to him of the *share certificate*, without a compliance with the forms required by the corporation for a transfer of the shares."

In Morawetz, Private Corporations (2d ed.) § 197, it is said: "There is no inconsistency between a law requiring transfers to be executed on the stock-books, and a custom by which assignments of shares are made by indorsement and

delivery of the certificates. A transfer of shares means a complete substitution of shareholders, and novation of the contract of membership, as against the corporation, as well as the parties to the transfer; an assignment means a transfer of the equitable ownership, together with a right to obtain a complete transfer upon complying with the forms prescribed by the charter. To hold that a provision requiring all transfers to be executed on the books implies a prohibition against assignments by delivery of the certificates, is to place a strained and unnecessary construction upon the statute, in order to reach a very undesirable result."

The courts of this State have recognized the principle that although a transfer on the books of the corporation may be necessary to create a legal title, an equitable title may be created without such transfer. *Lockwood v. Mechanics' Nat. Bank*, 9 R.I. 308, 331; *Lippitt v. American, etc., Co.*, 15 R. I. 141. In England equitable assignments formerly were not recognized. Consequently, in the early cases, a gift of the evidence representing non-negotiable choses in action failed for want of legal delivery. The later cases, however, have gradually adopted the modern doctrine above stated. *Duffield v. Hicks*, 1 Dow. & Cl. 1; *Re Patrick* (1891), 1 Ch. 82. See *Leyson v. Davis*, 17 Mont. 220, 281. The modern doctrine has not been applied in England, however, to certificates of stock. *Milroy v. Lord*, 4 DeG., F. & J., 264. See Pom. Eq. Jur. (3d ed.), § 1148 note.

It has been very conclusively shown by the foregoing discussion that, while the general doctrine of *Milroy v. Lord*, (*supra*), has been recognized and approved, both in this State and elsewhere, the courts of this country have universally refused to follow its extreme application as applied to gifts or trusts of corporate stocks. The injustice, as well as the absurdity of a doctrine refusing to recognize a gift of unindorsed certificate of stock is well pointed out by Dean Ames in his *Cases on Trusts*: "Even in jurisdictions where the gift is ineffectual unless the shares, or deposit, are transferred on the books of the company or savings bank, the donor would not be allowed to recover the certificate or bank-book after he had once

delivered them with the intention of vesting them in the donee. We should have, then, this extraordinary condition of things; the donee unable to transfer the shares or collect the deposit, because the gift is not deemed complete; the donor equally helpless because he cannot produce the certificate or bank-book; the company or bank, on the other hand, in a position capriciously to recognize either the donor or the donee as *dominus* of the claim, or, indeed, unless they come to some compromise, to refuse with safety to recognize either." 1 Ames, Cases on Trusts (2d ed.), 156 note; 12 Harv. L. Rev., 498, 499; see also *Duffield v. Hicks*, 1 Dow. & Cl. 1.

- (10) In view of our conclusions that the settlor in this case created complete trusts *in præsenti* when he delivered the trust assignments and certificates of stock to Martha Talbot as trustee, the final contention of the complainant's counsel, that circumstances indicated a purpose on the part of the settlor to make a testamentary disposition of the stocks, is clearly untenable. The conveyance of the stocks was none the less present because of the fact that one of the evident purposes of the trust was to secure a distribution of the property after the grantor's death. Thus in *Stone v. Hackett* (*supra*), 12 Gray, 227, 231, it is said: "Nor are we able to see any force in the suggestion that the trust which the donor created in some of its features looked to a disposition of the property which was the subject of the gift after his death. We know of no principle of law which renders such a transfer of property *inter vivos* invalid." When, after Frederic Talbot's death, the trustees, having then all of them come into possession of the trust assignments and stock certificates, proceeded to present the same to the Gorham Manufacturing Company and the Silversmiths Company, and to demand and receive new certificates for said stocks in their own names as trustees, they did what it was their undoubted right and duty to do, and simply exercised the powers and duties conferred and imposed upon them by the settlor. The settlor had done all that was incumbent upon him to transfer the ownership of the stocks, and the trustees, by the issue of the new certificates to them, by the corporations, became then, as between

themselves and the corporations, lawful stockholders therein, capable of exercising all the rights of stockholders by way of voting and receipt of dividends.

In our opinion, in answer to the questions propounded by the bill, the five assignments in trust are valid, the trusts therein were and are fully constituted, and said trustees should hold said stock certificates under the trusts of the said instruments.

A decree in accordance herewith may be presented for approval.

Herbert A. Rice, for complainants.

Edwards & Angell, Royal H. Gladding, James C. Collins, for respondents.

Eugene A. Kingman, of counsel.

ELIZABETH MANIERRE *et al.* vs. WILLIAM BRENTON WELLING
et al.

JANUARY 11, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Wills. Restraint on Alienation.*

Testatrix, desiring to preserve her family seat as a home for her children, by testamentary devise directed her executor to have the farm laid out in as many plots, approximately equal to each other, as there should be children or issue of deceased children then surviving her, and to apportion the plots among such persons, and devised one of said plots to each of such children (or issue of deceased children, as tenants in common), in accordance with the apportionment of the executor, and provided that "all the devises of portions of my (farms) are made upon the condition that if any of my children or grandchildren shall voluntarily or involuntarily alienate or devise the portion of said lands set apart to him or to her other than to some descendant of mine (except for life to the wife or husband of some descendant) while such descendant may be living and without the consent of all my descendants, who shall at the time be of full age and competent to convey and devise real property, in such event the interest of such child or grandchild therein shall cease and be determined and such estate shall thereupon vest in my other descendants then living *per stirpes* and not *per capita*."

Held, that the words "while such descendant may be living" following the parenthesis should be read as if included within the parenthesis, as referring

to the last word "descendant" within the parenthesis, so as to read "except for life to the wife or husband of some descendant while such descendant may be living."

Held, further, that the effect of the clause was to devise to the persons therein named, as tenants in common, an estate in fee subject to the power given the executor to divide the same, and subject to the restrictions upon alienation of the portions so divided.

(2) *Powers in Trust.*

Held, further, that no estate was devised to the executor but only a power of division and allotment, which was a power in trust.

(3) *Rule Against Perpetuities.*

Held, further, that the restriction was placed upon the first devisees only, and as the breach of the condition must occur and the limitation dependent thereon must vest, if at all, within the lifetime or at the death of persons in being at decease of testatrix, the restriction did not violate the rule against perpetuities.

(4) *Restraint on Alienation.*

The fact that a restriction upon alienation is limited in duration does not of itself make such restraint valid, if it is otherwise unreasonable or so general in its scope and effect as to operate as a substantially absolute restraint upon alienation for such limited time.

Held, further, that the restraints upon voluntary alienation were so general and so nearly absolute in their character that they were invalid, and that the law was well settled that such restraints as testatrix attempted to provide against involuntary alienation, through proceedings by creditors of the devisees, were also void.

(5) *Wills. General Intent.*

Held, further, that the restraint on alienation was only incidental to the general scheme of testatrix to provide that her children, or the issue of any deceased child, should have parts of these estates, approximately equal in area, that they might have neighboring sites for their homes. Such general intention therefore should be made effective, and such incidental feature as was held to be void should be disregarded.

(6) *Wills. Separation of Valid and Invalid Clauses.*

Where invalid portions of a will can be separated from that which is valid, without violence to the general testamentary scheme, the invalid clauses will be disregarded and those which are valid, upheld.

Held, further, that the clause was valid as devises of the real estate free from the restraint upon alienation.

(7) *Power of Alienation.*

The power or right of alienation includes the power or right to dispose of property held in fee in such manner as the owner sees fit, by gift, settlement in trust, by will, or by sale, or other mode of conveyance, so that the purpose of the owner, whether of benevolence or to obtain value therefor, should be carried out. As a further incident to such power such an estate should be

subject to the owner's debts so that his creditors may be enabled to avail themselves thereof through proper proceedings.

BILL IN EQUITY, for partition. Certified to the Supreme Court under Gen. Laws, 1909, cap. 298, § 5.

PARKHURST, J. This is a bill for the partition of certain real estate in Rhode Island, of which Katharine C. Welling died seized.

The decision of the case involves the legal effect of certain provisions of the will of said Katharine C. Welling and the codicil thereto, and questions as to this have been certified by the Superior Court to this court under the provisions of General Laws, of 1909, chap. 298, § 5. The provisions of the will and codicil involved are as follows:

SECOND AND THIRD CLAUSES OF WILL.

"Second. Whereas, I desire to perpetuate, as far as I can, the affectionate relations which have always subsisted between my children, and I am satisfied that the most effectual means to that end is to provide for them and their families, sites for country homes in proximity to each other which will be endeared to them by associations with their childhood and their parents and hence wish that my homestead and family seat known as Pojac Point Farm in said town of North Kingstown, Rhode Island may continue to be preserved in the future exclusively as such country homes for my children and grandchildren; accordingly I hereby direct my executors or whichever shall qualify as such within two months after probate of my will to have said Pojac Point Farm laid out in as many plots, approximately equal to each other in area, as there shall be children of mine then surviving me and children of mine deceased leaving issue and within six months thereafter to apportion and allot the said plots among my said surviving children and the families of such as may be deceased leaving issue so that each of my said surviving children and the family of each such deceased child shall have one of such plots and I give and devise one of said plots to each of my said surviving children

and one of said plots to the child (or children as tenants in common if there be more than one) of each child of mine that may be deceased leaving issue in accordance with the apportionment made by my said executors, as aforesaid. And I further direct that said plots shall be laid out in such form, location and containing such buildings or other improvements existing at my decease, and shall be allotted and apportioned to and among said devisees as my executors or executor, in their or his discretion, may determine to be most suitable and equitable. In making such apportionment I authorize and recommend, but do not direct, that my executors endeavor to obtain from all my surviving children a mutual agreement as to the apportionment of said lands, and if such agreement be made within four months after the probate of my will, that my executors, or the one who may qualify, apportion said land in accordance with such agreement; but, if such agreement be not made among all my surviving children within said period, then, that my said executors or executor make such allotment as they or he shall deem proper.

"And I further provide and declare, that all the devises hereinabove made of portions of my Pojac Point Farm, and also those hereinafter made in the *third clause* of my will, of my farm called Tanglewood, are made upon the condition that, if any of my children or grandchildren shall voluntarily or involuntarily alienate or devise the portion of said lands other than to some descendant of mine (except for life to the wife or husband of some descendant) while such descendant may be living and without the consent of all my descendants, in such event, the interest of such child or grand child therein shall cease and be determined, and such estate shall, thereupon, vest in my other descendants then living, per stirpes and not per capita.

"*Third.* The farm known as 'Tanglewood,' purchased by me and adjoining my said homestead farm and likewise situated in said town of North Kingstown, I direct my said executors to allot and apportion among my children and the families of those deceased leaving issue in the same manner as I have directed in the case of Pojac Point Farm, making the same

recommendations and giving my said executors the same powers with respect thereto and I give and devise one of the plots so laid out to each of my said surviving children, and one of said plots to the child (or children if more than one, as tenants in common) of each child of mine that may be deceased leaving issue in accordance with the apportionment made by my said executors as aforesaid, subject to the condition as to alienation set forth in the foregoing *second clause* of my will."

FIRST CLAUSE OF CODICIL.

"*First.* I alter and amend the second paragraph of the second clause of my said last will and testament so as to read as follows, to wit:

"And I further provide and declare that all the devises hereinabove made of portions of my Pojac Point Farm, and also those hereinafter made in the third clause of my will of my farm called Tanglewood, are made upon the condition that if any of my children or grandchildren shall voluntarily or involuntarily alienate or devise the portion of said lands set apart to him or her other than to some descendant of mine (except for life to the wife or husband of some descendant) while such descendant may be living and without the consent of all my descendants, who shall at the time be of full age and competent to convey and devise real property, in such event the interest of such child or grandchild therein shall cease and be determined and such estate shall thereupon vest in my other descendants then living per stirpes and not per capita."

RESIDUARY CLAUSE OF WILL.

"*Fifth.* All the rest, residue and remainder of my estate of every description and wherever situated, including all property over which I have any power of appointment or disposition by will, I give, devise, bequeath and appoint in as many equal shares as there shall be children of mine surviving me, and children of mine deceased, leaving issue surviving me, as follows: to my son, William Brenton Welling, one equal share; to my daughter Emily Greene, wife of J. Noble Hayes, Esquire,

of New York, one equal share; to my executors (or executor, if but one,) one equal share, in trust however, to receive the rents, issues, profits and income thereof, and apply the same to the use of my daughter Katherine G. Welling, during her natural life and on her death to convey and transfer the said share to such person or persons as my said daughter, Katherine, may, by her will, appoint, and, in default of such will, to such persons as would take the same, had my said daughter died intestate seized and possessed of said share, absolutely: to my said son Richard Ward Greene Welling, one equal share, and to my daughter Elizabeth H. wife of Charles Manierre, Esquire, of New York, one equal share; to my daughter Mary Hart, wife of Heinrich Baltz, Esquire, of Philadelphia, Pennsylvania, one equal share."

The questions certified to this court are as follows:

"1. Is the restraint on alienation imposed by the second paragraph of clause 'Second' of the will of said Katherine C. Welling as amended by the 'First' clause of the codicil, valid or invalid?

"2. If the restraint on alienation imposed by the second paragraph of clause 'Second' of the will of said Katharine C. Welling as amended by the 'First' clause of the codicil is invalid, are the 'Second' and 'Third' clauses of said will as amended by the 'First' clause of said codicil thereby rendered wholly invalid and of no effect, or are said clauses as thus amended valid as a devise of the real estate therein mentioned free from the restraint upon alienation?

"3. If the 'Second' and 'Third' clauses of the will of said Katharine C. Welling as amended by the 'First' clause of the codicil are wholly invalid and of no effect, do the 'Pojac Point Farm' and the 'Tanglewood Estate' pass under the residuary clause of said will or do they descend as an intestate estate?"

These are questions merely of legal interpretation to be answered by reference to the will and codicil alone, and no other matters can properly be considered.

- (1) As preliminary to the discussion of these questions, we first proceed to a construction of the "Second" and "Third"

clauses of the will, as to the nature and extent of the estate thereby intended by the testatrix to be devised. We are of the opinion that it was the intention of the testatrix to devise and that she did thereby devise, to the persons, named therein, as tenants in common, an estate in fee in both the "Pojac Point Farm" and the "Tanglewood Farm;" subject to the power given to her executors to divide the same, and subject to the restrictions upon alienation of the portions thereof so divided. The intention that her children living at her decease and the children living, at her decease, of any child of hers not then living, should have the whole of these estates, and her reasons therefor and hopes and desires in connection therewith are fully set forth in the language of the devises. No estate in these lands is devised to her executors, but she only gives them the power of division and allotment, which is construed as a power in trust.

- (2) In the case of *Henderson v. Henderson*, 113 N. Y. 1, the will of H., after authorizing and directing his executors to "partition, divide and apportion" his residuary estate among his children living at the time of such partition, and the issue of any child or children who had died leaving issue, provided as follows: "And I do hereby give, devise and bequeath to each of my said children, the share or portion of my said estate so to be partitioned, divided and apportioned to them respectively as aforesaid. . . . If any of my children shall die without leaving issue before such partition and division shall be made, then I give the portion of such deceased child equally to the brothers and sisters of such deceased child. . . . If any of my children shall die leaving issue, then the child or children, (who shall be living at the time of such partition), of such deceased child of mine shall take and have the share or portion which the parent would have if living. . . . It is my will that my executor make the partition as soon after my decease as practicable, having reference to the condition of my estate, but as he may find it necessary to realize upon securities and sell and convert into money both real and personal property, . . . which he may not be able speedily to make without sacrifice

and loss to my estate, he shall not be compelled to make such partition, &c., until after the lapse of five years from the probate of this will."

All the testator's children were living and of full age at the time of his decease. In an action for the construction of the will, held, that no valid express trust was created by the will, and the legal title to the real estate vested in the testator's children at his death, subject to the power given the executor to partition; that the direction to partition, &c., although ineffectual to create a valid trust, could be upheld as a power in trust. Also held that no unlawful perpetuity was created by authorizing the executor to delay partitioning the estate for five years, as the power of sale was not suspended.

"The powers of partition and of sale being valid, however, the children of the testator took their interests at his death subject to their exercise, and hence, one or more of them could not maintain any compulsory partition proceedings, pending the existence of the right in the executor to exercise his powers. Although there is no present express devise to the children of the residuary estate, but only the direction to the executor to divide and apportion it among them, if they were alive at the time of distribution, we think their interests must be considered as having vested at the testator's death. Such would be the result from the fact that no valid trust estate has been created in the executors and such would be fairly inferable as an intention of the testator from his language in the sixth clause, where he says: 'I do hereby give &c., to each of my said children the share or portion of my estate so to be partitioned, &c., as afore-said.' The time of conveyance of the realty to and of the distribution of the personalty among the children, is postponed, only, but that is not inconsistent with the vesting of the undivided shares. We regard that language as disposing of the suggestion that time was of the substance of the gift."

It will be seen that the above case closely resembles the case at bar in this aspect. And see also, *Mandlebaum v. McDonell*, 29 Mich. 78, 84, *et seq.*; *Bennett v. Chapin*, 77 Mich. 526; *Johnson v. Preston*, 226 Ill. 447, 458.

We will proceed to the consideration of the first question submitted, viz.: "1. Is the restraint on alienation imposed by the second paragraph of clause 'second' of the will of said Katharine C. Welling as amended by the First' clause of the codicil valid or invalid?"

The respondents Hayes, having demurred to the bill and thereby raised the questions certified, contend that said restraint is invalid:

"A. Because such a restraint is repugnant to the devise of the fee-simple estate as made by the granting part of said clause.

"B. Because the restraint lasts for a period beyond that allowed by the rule against perpetuities, and even if not technically within the rule is nevertheless unreasonable in extent and void."

The complainants and certain other respondents take the converse position, claiming that said restraint is valid, contending that:

"a. The restraint is not obnoxious to the rule against perpetuities.

"b. The restraint is a limited and reasonable one and does not take away the whole power of alienation substantially."

For convenience, we will repeat the second paragraph of clause second of the will in question, as amended by the first clause of the codicil, as follows:

"And I further provide and declare that all the devises hereinabove made of portions of my Pojac Point Farm, and also those hereinafter made in the third clause of my will of my farm called Tanglewood, are made upon the condition that if any of my children, or grandchildren shall voluntarily or involuntarily alienate or devise the portion of said lands set apart to him or her other than to some descendant of mine (except for life to the wife or husband of some descendant), while such descendant, may be living and without the consent of all my descendants, who shall at the time be of full age and competent to convey and devise real property, in such event the interest of such child or grand child therein shall cease and be

determined and such estate shall thereupon vest in my other descendants then living per stirpes and not per capita."

At the outset, in construing said paragraph, we hold that the words "while such descendant may be living," following the parenthesis, should be read as if included within the parenthesis, as referring to the last word "descendant" within the parenthesis, so that it would read "(except for life to the wife or husband of some descendant while such descendant may be living;)" this gives a clear and definite meaning to the words, just as we should construe them if the parenthesis had not been used; and is obviously what the testatrix intended by them.

In further consideration of the construction of said paragraph, it is obvious that the restraint upon alienation is sought to be effected, not directly by a bald declaration that the estates given shall be inalienable, but indirectly by a provision for a limitation over by way of executory devise, if alienation (except as permitted) is attempted. We do not, however, understand that any of the parties claim that any different rule applies to restraints upon alienation in this form, as applied in this case, than is generally applied to restraints upon alienation in any other form; nor do we find that any of the cases cited make any such distinction. See *In Re Dugdale*, 38 Ch. D. 176, 181.

The first question involves the further construction of said paragraph to ascertain whether the time during which the restraint is intended to operate is such as to render it obnoxious to the rule against perpetuities. At the outset it is clear that the prohibition against alienation in this will is not a sweeping one, applying to all future owners or making any and all future alienation impossible. The restriction, as it appears in the codicil, applies only to the first devisees of the property and not thereafter. It is a restraint placed upon the children and such of the grandchildren as take a portion of the estate at the death of the testatrix by reason of the previous decease of their parent (a child of the testatrix).

In the first paragraph of the second clause of the will the testatrix carefully provided that her executors should plot out her Pojac Farm estate in "plots, approximately equal to each

other in area," and set apart the same, one to each of her surviving children and one to the child or children of a deceased child, and a similar provision is made in the third clause of the will in regard to the Tanglewood estate. The testatrix doubtless had in mind the possibility that one or more of her children might die before her and leave children, and for such grandchildren she made provision by giving them their parents' share, subject to the same condition against alienation as was imposed on the portions given to her children.

In the codicil to the will she has clearly expressed this intention. The condition is not imposed on all grandchildren living or unborn at the time of the testatrix's death, but only upon such grandchildren as have a portion of said lands "set apart to him or her." These last words, quoted from the codicil, read in the light of the previous paragraph of this clause of the will, are not in any way applicable to grandchildren who receive a portion of this estate from their parent or from the other children of the testatrix, but are descriptive only of such grandchildren as are first takers of an interest in this estate, such as have a portion "set apart to him or her" by the executors when they make their apportionment. It is significant that the insertion of these words "set apart to him or her" was one of the two changes made by the codicil in this paragraph as it stood originally in the will. It is to be presumed that the testatrix intended something by this change, and we are of opinion that by such words she has clearly expressed her intention that the restraint on alienation should apply to her children and only to such of her grandchildren as should be first takers; the second paragraph of clause "second" of the will in its original form, prior to its amendment by the codicil, would, in our opinion, have been rightly construed as creating a perpetuity; and we are clearly of the opinion that this objection has been remedied by

(3) the amendment contained in the codicil. The breach of the condition must occur, and the limitation dependent thereon must vest, if at all, within the lifetime or at the death of persons in being at the time of the death of the testatrix. It follows, then, that this paragraph of the will in no way violates the rule

against perpetuities. (Gray: Rule against Perpetuities, p. 156.)

We have carefully considered the contrary views of counsel for the respondents Hayes upon this point, and find nothing therein to disturb our conclusions above expressed. It seems to us that the matter is too clear to require further discussion.

- (4) But, while we hold that the attempted restraint upon alienation is so limited in its duration as not to be void for remoteness, as tending to create a perpetuity, yet we are of the opinion that such limitation in duration does not of itself make a restraint valid, if it is otherwise unreasonable or so general in its scope and effect as to operate as a substantially absolute restraint upon alienation for such limited time. See *In Re Rosher*, *Rosher v. Rosher*, L. R. 26 Ch. D. 801, 820, *et seq.*; *Blackburn v. McCallum* (Canada), 33 S. C. R. 65; *Re Martin and Dagneau*, 11 Ont. Law Rep. 349, 351; *Renaud v. Tourangeau*, L. R. 2. P. C. A. 4; *In Re Dugdale*, 38 Ch. D. 176, 179; *Mandlebaum v. McDonell*, 29 Mich. 78, 94 *et seq.*; *Potter v. Couch*, 141 U. S. 296, 315; *Anderson v. Cary*, 36 Ohio St. 506; Gray, Rest. on Alienation, §§ 52-54 (2d ed.) and other cases cited *infra*.

The next consideration involved is whether or not this restraint upon alienation, limited as we have shown as to its duration to the lives of the first takers, is also so limited as to its scope and effect that it is reasonable and does not take away substantially the whole power of alienation.

The language used restrains voluntary or involuntary alienation or devise, except to descendants of the testatrix who, at the time of making her will, and of her death, had six children, all of whom were adults and some of whom were married and had families. To any of these persons, or to any grandchildren of the testatrix born after her death, the possessor of any portion of these estates has the right of alienation, or devise. There is also the right to dispose of this property for life to the wife or husband of any descendant "while such descendant may be living." Finally, there is the right to alienate in any form, to any person in the world, with the consent of all the

other descendants of the testatrix capable of giving such consent.

Certain general principles regarding the nature of an estate in fee simple are undisputed. It is settled that the ownership of such an estate involves as an incident thereof the power of alienation; and that an absolute restraint upon all alienation is void. See Co. Inst. § 360; Shep. Touch. 129; Co. Litt. 222, 223a. But certain limited restraints have been held to be valid; thus in Co. Inst. § 361, it is said, "but if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, *which conditions do not take away all power of alienation from the feoffee, etc.*, then such condition is good."

The cases in England, in Canada, and in this country are in hopeless conflict as to the extent to which restraints may be permitted. The English cases most strongly relied upon by the complainants, and by certain respondents (the Wellings), in support of the validity of the restraint in the case at bar are *Doe d. Gill v. Pearson*, 6 East, 173 (1805); and *In Re Macleay*, L. R. 20 Eq. 186 (1875).

Doe d. Gill v. Pearson, 6 East, 173 (1805), is unquestionably a leading case on this subject in England. That was a case in the Court of the King's Bench, involving a devise to two of the testator's daughters, Ann and Hannah, "to hold to them my said daughters Ann and Hannah, their heirs and assigns forever as tenants in common, and not as joint tenants; *upon this special proviso and condition*, that in case my said daughters Ann and Hannah Collett, or either of them, shall have no lawful issue, that then and in such case they or she having no lawful issue as aforesaid, shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters or to their children." Ann levied a fine of her share, and later died without ever having had any issue. Then Hannah made an entry to avoid this fine and brought ejectment. The case was fully argued before the full bench and the court took the matter under advisement. It was held, Lord Ellenborough delivering the opinion of the court, that the con-

dition was good in point of law and the testator's heirs could enter for breach of the condition. And the court cites, and relies strongly upon, *Daniel v. Ubley*, Sir W. Jones, 137; Latch 9, 39, 134.

In 1875 this case was followed in *In re Macleay*, L. R. 20 Eq. 186. In that case there was a devise to the testatrix's brother of certain land in fee "on the condition that he never sells it out of the family." The testatrix then gave legacies to her nephews and nieces named in the will, and after a legacy to a servant, gave the residue of her estate and effects to her "dear brothers" and "dear sisters." The devisee contracted to sell the land to Macleay and the question was whether he could give a valid marketable title. In his opinion, Sir G. Jessel, Master of the Rolls, held that the condition, being limited as to time, to the life of the first tenant in tail, was not void for remoteness; and being limited as to the mode of alienation, prohibiting sale only, did not forbid leasing, mortgaging, or settling; and was therefore a limited restriction upon alienation, and was valid. The learned judge distinguished the case of *Attwater v. Attwater* (18 Beav. 330), as being a case where the Master of the Rolls found that the devisee was, in effect, forbidden to sell at all. He cited with approval *Doe d. Gill v. Pearson* (*supra*), and says, at page 189: "The test is whether the condition takes away the whole power of alienation substantially; it is a question of substance and not of mere form."

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220792 It is to be noted that in *In Re Macleay*, the restraint was only against selling, and not against other forms of alienation. Lord Jessel laid stress upon this point, and also relied upon the fact that by the word "family" the testator meant to include all his blood relations, so that the class was very large. It is also to be noted that there was no argument of opposing counsel, as the case was heard *ex parte*; and that the correctness of the decision was doubted in the case of *Re Rosher*, 26 Ch. Div. 801, 816 (*infra*).

The same parties also cite certain Canadian cases in support of the doctrine of *In Re Macleay* (*supra*), viz.: *Earls v. McAlpine*, 27 Grant Ch. (U. C.) 161; *Re Weller*, 16 Ontario Rep.

318; *Smith v. Faught*, 45 U. C. Q. B. 484; *Re Northcote*, 18 Ont. Rep. 107; *O'Sullivan v. Phelan*, 17 Ont. Rep. 730; *Pennyman v. McGrogan*, 18 U. C. C. P. 132; *Re Winstanley*, 6 Ont. Rep. 315; *Chisholm v. The London & Western Trusts Co.*, 28 Ont. 347; *Re Martin and Dagneau*, 11 Ont. Law Rep. 349; *Re Porter*, 13 Ont. Law Rep. 399.

Earls v. McAlpine, *supra* (affirmed on appeal 6 A. R. 145), which is regarded as a leading case in Canada, was a case where the testator devised his farm to his two sons in equal moieties, subject to certain legacies to his daughters and also a comfortable support for his wife or the sum of £10 to be paid by each of the sons annually during her life, and directed that the devisees should not sell or transfer the said property during the lifetime of his widow without her written consent. One of the devisees, however, without obtaining the consent of the widow, mortgaged his portion of the estate. The court held that the condition on the devise was valid, and that there had been a forfeiture of the estate which the devisee took under the will. (V. C. Blake) said: "I then thought and still am of opinion that the condition in this will as to alienation is a reasonable one—not repugnant—and one which could be supported as intended to benefit the wife in further securing the provision made for her under the will. I considered it reasonably clear on the authorities that a condition not to alien to a particular person or for a particular time is good; and also that where the condition could be traced not to the mere whim of the testator, but to the desire to secure a legacy, or benefit a beneficiary under the will, there the court would sustain the condition for any such purpose inserted in the will. The case of *Daniel v. Ubley* (Sir Wm. Jones, 137), followed in *Doe d. Gill v. Pearson* (6 East 173), supported this view." The court referred to *Attwater v. Attwater*, 18 Beav. 330 (*infra*), and *Gallinger v. Farlinger*, 6 U. C. C. P. 512 (*infra*), but refused to follow them.

In *Re Weller*, *supra*, lands were devised to a married woman with a provision not to alienate or incumber them until her sister arrived at the age of forty years, and also that the

devise should be for her separate use independent of her husband's control. Held that the restraint on alienation was valid and would have been so even if applicant had been *feme sole*. (Follows *Earls v. McAlpine*, 27 Gr. 161; S. C., 6 A. R. 145; *Pennyman v. McGrogan*, 18 C. P. 132; *Smith v. Faught*, 45 U. C. Q. B.; *Re Winstanley*, 6 Ont. Rep. 315; rather than *Re Rosher*, 26 Ch. D. 801.)

Smith v. Faught, *supra*, was a case where there was a direction, in a devise of a fee simple, that the devisee should "not sell or cause to be sold the above named lot or any part thereof during her natural life, but she shall be at liberty to grant it to any of her children that she shall think proper." The court quoted at length from *In re Macleay*, *supra*, and held that since the restriction was limited in its effect, and reasonable, it was valid.

O'Sullivan v. Phelan, *supra*, was a case where the testator devised land to two nephews with the injunction that "neither of my said nephews is to be at liberty to sell his half of the said estate to anyone except to persons by the name of O'Sullivan in my own family." The court held that this was but a restricted restraint on alienation, and was valid.

In the case of *Pennyman v. McGrogan*, *supra*, a testator who died in 1854, devised certain lands to his two sons in fee, "but not to be assigned to any person, except a son of his, for the term of twenty years from the day of his decease." Held, that the condition was not void as in general restraint of alienation, and that the plaintiff, who claimed an ejectment, under a title derived from the sons in violation of this condition, could only recover such portion of the land as they were entitled to as *heirs* of their father. In delivering judgment of court, Wilson, J. said: "It is said in Smith on real and personal property, page 65, 'Where a conveyance or devise is made of real property for an estate in fee, or a conveyance or bequest of the absolute interest in personalty, subject to a condition in general restraint of alienation, such a condition is void for repugnancy, as a power of alienation is inseparably incident to such an estate or interest. But a condition not to

alien real or personal estate to a particular person or for a particular time is good.' Co. Litt. Secs. 223 and 223 b; Co. Inst. Secs. 360, 361, Shep. Touch. 76, *Ware v. Cann*, 10 B. & C. 433. In this case the restraint on alienation is only for a particular time, namely, twenty years, during which the devisees may alien to any of the sons of the testator. But it is shown that within the twenty years next after the death of the testator James and George both assigned their estate to McGrogan and therefore forfeited it."

In *Re Winstanley*, *supra*, E. R. W. was devisee under will of her father, R. B., of certain real estate, after death of his wife, real estate to be for benefit of his son and two daughters—a certain lot to E., providing she shall not dispose of same except by will; and in the same manner a lot to the other daughter, and if either depart life without leaving issue, then the survivor shall be possessed of share of deceased sister. Held, that E. took estate in fee simple subject to condition against alienation in any manner except by testamentary instrument, and that such restraint was valid.

In the case of *Chisholm v. The London & Western Trusts Co.*, 28 Ont. 347, the testator devised two parcels of land respectively to his two sons, and provided that the same were not to be at their disposal at any time until the end of twenty-five years after the testator's decease, and same shall remain free from all incumbrances and no debts contracted by his sons shall by any means incumber same during twenty-five years from date of his decease. One of the sons died about two years after his father, having devised the lot to his brother; the plaintiff, who, within the period limited by his father's will, sought to mortgage it. Held, a valid restriction so far as it was a restriction against the plaintiff selling and conveying the lands or incumbering them by way of mortgage within the period mentioned. In this case the court said, p. 350 (citing with approval many of the above cases): "The decided cases in our own courts show, as I think, that the restriction against alienation contained in this will and mentioned and referred to in the special case is a good

and valid restriction so far as it is a restriction against selling and conveying or encumbering lands by way of mortgage."

The case of *Re Martin and Dagneau*, 1906, 11 Ont. Law Rep. 349, contains a review of the Canadian and English cases above cited, and decides that a condition which restricts the devisees as to one manner of alienating, as by mortgaging or selling, is valid; but also citing cases to the effect that if all method of alienation was restricted even for a limited time, the condition would be invalid.

In *Re Porter*, 1907, 13 Ont. Law Rep. 399, it is held that where "the will forbids alienation by mortgage or selling during the lifetime of a devisee and does not restrain alienation by will, lease or other manner, except by mortgage or sale, such condition is good." The case refers to the case of *Re Martin and Dagneau* (*supra*) for discussion of the previous authorities, and approves and follows it.

In the brief for the respondents (Wellings), after the citation of the foregoing English and Canadian cases, we find the following statement. "In this country the authorities are in hopeless conflict on this question. There are but few decisions bearing directly on it, and it is safe to say that in not one of these is there a well considered opinion dealing adequately with the authorities." . . . And again, in the same brief, referring to authorities cited from the courts of this country, in support of the validity of the restraints here under consideration, we find the statement: "We frankly admit that for the most part they are dicta, but we submit that they are expressions of opinion by courts of high standing and judges whose opinions are of great weight. It should also be borne in mind that *our contention is not that any limited restraint on alienation is valid, but only such as is reasonable in its operation and does not in fact take away the whole power of alienation.*" We have carefully examined the cases thereafter cited on the said brief, and quite agree with the foregoing statements as applied to those cases. We do not find any case among them where the attempted restraint upon alienation was similar in scope and effect, or in any wise comparable to the restraints here under

consideration; and an extended review of these cases would only tend to confuse, and would furnish no precedent which would be of service in this discussion; we need only say, with regard to those cases, that, whatever statements they contain, which might possibly be construed to support the validity of the restraints here under consideration, are *obiter dicta* in most of them; that in *Jackson v. Schutz*, 18 Johns. 174, 184, cited to the effect that a "grantee may be restrained from assigning for a particular time," that statement was also *obiter dictum* because the case was really decided upon other grounds, and this point was not involved in the case; and was also contrary to the overwhelming weight of authority, as shown in the cases hereinbefore cited; with regard to *Jackson v. Schutz*, see also *De Peyster v. Michael*, 6 N. Y. 467, 490, *et seq.* where it is overruled so far as it relates to the question of general restraints on alienation; and see also *Mandlebaum v. McDonell*, 29 Mich. 78, 100. With regard to *Stewart v. Brady*, 3 Bush. 623, which was followed by *Stewart v. Barrow*, 7 Bush. (Ky.) 368, and later again by *Wallace v. Smith*, 113 Ky. 263, where the question was fairly presented, it was expressly held that an absolute restraint upon the power of sale of a fee for particular time is good; but there is no citation of authority by the court, and there appears to have been little consideration of the matter by either court or counsel in the earlier cases; while the last case is held to be ruled by the previous decision, the court saying: "We are constrained to hold," &c. These Kentucky cases are likewise against the weight of authority upon this point; see *Mandlebaum v. McDonell*, 29 Mich. 78, 106; Gray, *Rest. on Alienation* (2d ed). §§ 52, 53, 54. We find no other cases cited upon this point by the respondents (Wellings) which need be mentioned, except to say that the restraints under consideration in *Munroe v. Hall*, 97 N. C. 206, were treated as void; that in *Den v. Blackwell*, 15 N. J. Law (3 Gr.) 386, and *Feit v. Richards*, 64 N. J. Eq. 16, it was not necessary to pass upon the validity of the restraints, and the general remarks upon that subject are merely illustrative and clearly *obiter*; and the other cases cited, viz.: *Dougal v. Fryer*, 3 Mo.

40; *Langdon v. Ingram's Gdn.*, 28 Ind., 360; *M'Williams v. Nisly*, 2 Serg. & R., 507, 513; *Gray v. Blanchard*, 8 Pick. 284, 289; *Simonds v. Simonds*, 3 Metc., 558, 562, are all well and sufficiently reviewed in *Mandlebaum v. McDonell*, 29 Mich. 78, 98, *et seq.*, and are there conclusively shown to have no proper application in support of the validity of restraints upon alienation, when limited in time, so as not to be void for remoteness.

In accordance with the above cited cases the complainants and respondents Welling contend that the restraints upon alienation here under consideration, which permit alienation only to members of a certain class of persons, are to be sustained as valid, because, in the language of Jessel, M. R., they do not take away "the whole power of alienation substantially;" (*In Re Macleay*, *supra*).

On the other hand, the respondents Hayes contend that in the case at bar the restraints under consideration, properly construed, do take away "the whole power of alienation substantially;" that the cases above cited, so far as they apply, are expressly decided upon the ground that the restraints considered are partial and limited; that none of such cases is applicable to the case at bar, and that the cases of *Doe d. Gill v. Pearson*, (*supra*) and *In Re Macleay* (*supra*) have been doubted and criticised, by English cases of great weight, and have not been followed to the full extent in England or in Canada; and that they are opposed to the great weight of authority in this country. And these respondents, in support of their contentions, cite the following English and Canadian cases: *Attwater v. Attwater*, 18 Beav. 330; *Billing v. Welch*, I. R. 6 C. L. 88; *Gallinger v. Farlinger*, 6 U. C. C. P. 513; *Heddlestone v. Heddlestone*, 15 Ont. Rep. 280; *In Re Rosher*; *Rosher v. Rosher*, 26 Ch. D. 801; 816; *In Re Dugdale*, *Dugdale v. Dugdale*, L. R. 38 Ch. D. 176; *Renaud v. Tourangeau*, L. R. 2 P. C. A. 4. And the same respondents also cite the following American cases: *Mandlebaum v. McDonell*, 29 Mich. 78; *Potter v. Couch*, 141 U. S. 296, 315; *Johnson v. Preston*, 226 Ill. 447; *Schermerhorn v. Negus*, 1 Denio (N. Y.), 448; *Bing v. Burrus*, 56 S. E. (Va.) 222; *M'*-

Cullough's Heirs v. Gilmore, 11 Pa. St. 370; *Pardue v. Givens*, 54 N. C. 306; *Anderson v. Cary*, 36 Ohio St. 506.

In *Attwater v. Attwater* (1853), 18 Beav. 330, a testator gave an estate to A., to become his property on attaining the age of twenty-five years, "with an injunction never to sell it out of the family; but if sold at all it must be to one of his brothers hereafter named," of whom there were five. The court refused to follow the earlier case of *Doe v. Pearson*, 6 East 173, and held that the clause was inoperative. In ruling against the validity of the provision, it said (p. 336): "The meaning is, I think, plain, that the testator intended to impose this fetter:—that if the brother will not buy, the devisee was not to be at liberty to sell the property to anyone. The question is whether such a condition is a valid one? Notwithstanding the case of *Doe v. Pearson*, 6 East 173, this appears to me to be a condition repugnant to the quality of the estate given. It is obvious that if the introduction of one person's name, as the only person to whom the property should be sold, renders such a proviso valid, a restraint on alienation may be created as complete and perfect as if no person whatever was named; inasmuch as the name of a person who alone is permitted to purchase might be so selected as to render it reasonably certain that he would not buy the property, and that the property could not be alienated at all. It is not, in my opinion, desirable to impose fresh fetters on the enjoyment of property, and it appears to me, that this proviso is distinctly at variance with rules laid down by Lord Coke (Co. Litt. 223a), and which have always been considered and treated as good law. I am of the opinion, therefore, that this clause is merely inoperative."

The opinion in *Attwater v. Attwater*, was written by Sir John Romilly, M. R., and was followed in *Billing v. Welch*, I. R. 6 C. L. 88, where a covenant by the grantee of lands that he, his heirs and assigns, would not alienate, sell, or assign to anyone except his or their child or children without the license of the grantor, and reserving a penal rent for its breach was held repugnant to a fee simple and void. And see *De Peyster v. Michael*, 6 N. Y. 467.

The case of *Attwater v. Attwater*, was also followed in *Gallinger v. Farlinger*, 6 U. C. C. P., 513, which was a devise to the testator's sons in fee with the following restraint: "That my three sons, Michael, Henry and George shall not be at liberty to sell any part of my homestead farm herein willed except to each other and so descend to their heirs to the third generation." This restraint was held to be invalid.

In *Re Watson and Woods*, 14 Ont. 48, there was a devise to T., "on the conditions that he never will or shall make away with it by any means, but keep it for his heirs." This was held bad, and the court distinguished the previous case of *Re Winstanley*, 6 Ont. Reports, 315 (*supra*), on the ground that the "condition does not permit even a testamentary disposition."

Again, in *Heddlestone v. Heddlestone*, 15 Ont. Rep. 280, a condition that a devisee shall not dispose of certain land, either by sale or by mortgage, or otherwise, except by will to his heirs was held void, for it in effect takes away the whole power of alienation.

In the case of *In Re Rosher; Rosher v. Rosher* (1884), 26 Ch. D. 801, it appeared that a testator devised an estate to his son in fee, provided always that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof, in the lifetime of the testator's wife, she should have the option to purchase the same at the price of £3,000 for the whole, and at a proportionate price for any part or parts thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices. The real selling value of the estate was, at the date of the will and at the time of the testator's death, £15,000:— Held, that the proviso amounted to an absolute restraint on alienation during the life of the testator's widow; that it was void in law; and that the son was entitled to sell the estate as he pleased, without first offering it to the widow at the price named in the will. On page 810, Pearson, J., after stating the facts, continued: "The question I have to decide is whether, there being an absolute devise in fee simple to the son, the conditions annexed to it are valid.

I will deal first with the condition which relates to selling, and it will, I hope, shorten the observations which I have to make if I first state the manner in which I interpret this condition. The restriction upon selling is this, that if the son, or any person claiming through or under him, is minded to sell during the lifetime of the testator's widow, the estate intended to be sold, whether it is the whole or only part of the devised estates, must be offered to the widow at the price of £3,000 for the whole or at a proportionate price for a part. It is agreed that the value of the whole estate at the death of the testator was £15,000. It is, therefore, in effect a condition that, if the son desires to sell, he shall offer the estates to the widow, and that she is to be at liberty to buy them at one-fifth of their value. I consider that (and I mean to decide the case upon that conclusion) as an absolute restraint against sale during the life of the widow. I mean to treat it as if it had been, 'during the life of the widow you shall not sell,' because to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is, to my mind, equivalent to a restraint upon selling at all."

It having been urged in argument that the restraint in question was only a limited restraint, because limited in time to the life of the widow, and limited as to the mode (forbidding sale only), and so valid within the rule laid down by Jessel, M. R., in *In Re Macleay* (*supra*), the learned judge, after reading from that case, goes into a most elaborate and searching analysis of the cases upon which it is founded, viz.: *Daniel v. Ubley* (*supra*) and *Doe v. Pearson* (*supra*); and thereupon makes the following remarks, p. 816: "I ask myself, and with all respect I hope for the learned judges who decided those cases, what was the principle upon which they went, and how by any possibility that principle is to be applied to other cases in the future? In *Daniel v. Ubley*, the widow was to alienate to one of her sons: in *Doe v. Pearson* the discretionary power of alienation was limited 'to her sister or sisters, or their children.' What am I to say is the principle? Is it that there may be a condition that, if you alienate, you must alienate to a member of your

own family, or that you must look to the number of the individuals to whom the alienation is permitted, or when there are a number of individuals (not knowing at the present moment what that number may be), am I to inquire whether they are able, or likely to be willing, to purchase the property to which the condition is attached? If they are able and willing to purchase the property, am I to say that the condition is good, and if from their poverty they are unable, or from other circumstances are unwilling, am I to say that the condition is bad? It seems to me that the adoption of any such rule as that would produce the greatest uncertainty and confusion; in fact it would be absolutely impossible for any judge to apply such a rule to any case which might come before him, unless the facts of the case were absolutely identical with those of some previously decided case." And the learned justice then most carefully analyzes the judgment in *In Re Macleay*, and having shown many inconsistencies therein, with what he conceives to be the true principles laid down by Lord Coke, and certain inconsistencies, which he well sets forth, between different passages quoted from Lord Coke himself, proceeds to make the following remarks (pp. 819, 820): "I should be very sorry to do Sir George Jessel any injustice, and I must honestly say that in attempting to criticise so able and learned a Judge I am always afraid of falling into some error myself, and I am not quite certain that I understand correctly the extent to which in those passages he means to go. If he means to assert that, provided you give a power to mortgage or lease, you may restrain the power to sell, all I can say is, that I most respectfully differ from him, and I cannot understand how, after he had cited the maxim from *Coke* which he had quoted, he should have tried to lay down any such doctrine. Applying what he says to the present case, does he mean that, the estate being worth £15,000, although there is a restriction against selling, the son might immediately mortgage it for £15,000, or might lease it for 999 years? I can only say that it seems to me that both those things are hit by the maxim which he quotes with the greatest approbation, *quando aliquid prohibetur fieri, ex directo prohib-*

etur et per obliquum: and that this would be an infringement of any such condition is proved (if proof were wanting) by Large's case" (3 Leon. 182), "where, there being a gift to a son with a condition annexed to it that he was not to alienate within a particular time, he having granted four leases for sixty years to begin one after the other, it was held that they came within the prohibition. And in any case, if you are to hold that, though there is a prohibition of sale in the ordinary sense of the word 'sale,' still you may dispose of the estate in any other way, the condition so construed to my mind would be an absurd one; and, if not absurd, I am perfectly satisfied that the court would never now allow advantage to be taken of it because something had been done in one way which might have been done effectually in another way. It still remains for me to consider whether there is any decision that a condition absolutely restraining alienation is good if there is a limitation as to time, because, although I have dealt with these cases in order to clear the way with regard to the foundation upon which all the exceptions rest, still, as I hold that the exceptions stand on a principle absolutely removed from that of repugnancy, there may yet exist an exception which can be made to the condition, and which will be good by reason of a limitation of time." The learned justice then proceeds to examine the question whether a restraint upon alienation which takes away the powers of alienation for "a reasonable time, not trenching on the law against perpetuities," may be sustained as valid, by reason of such limitation of time; and, after a careful examination of Large's Case, 2 Leon. 82, 3 Leon. 182, and showing that, by misconception of the nature and effect of that case, it seems to have been held by certain textwriters that it was therein held that a condition attached to a devise in fee, not to sell within a limited time, was a good condition, finds (p. 821): "that there is not a single judicial decision to be found in the books showing that a limitation as to time added to such a condition makes it a valid condition," and cites, with approval, upon this branch of the case, *Mandlebaum v. McDonell* (18 Am. Rep. 61, 80), 29 Mich. 78, 102. The decision of the case is accordingly to the

effect that a condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, *e. g.*, to the life of another living person, is void in law as being repugnant to the nature of an estate in fee. And see to the like effect *Renaud v. Tourangeau*, 1867, L. R. 2 Priv. Counc. App. 4, where a testator in Lower Canada, by will devised real estate to his children, providing that they should in no way alienate the property until twenty years after death of testator. The Judicial Committee, per Lord Romilly, held that the restriction "was not valid either by the old law of France, or the general principles of jurisprudence."

In the case of *In Re Dugdale*, L. R. 38 Ch. D. 176, it appeared that a testatrix gave certain real and personal estate "upon trust for my third son, J., his heirs and assigns; but if my said son should do, execute, commit or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then and in such case the trust hereinbefore contained for the benefit of my said son shall absolutely cease and determine, and the estates and premises hereinbefore limited in trust for him" should go and be held in trust for his wife, or, if no wife then living, for his children equally; it further appeared that J. survived his mother, and was still living, a bachelor; and that he brought this suit by summoning in the other parties interested, and trustees under the will, claiming a declaration by the court that he was entitled absolutely to the property devised and appointed to him, upon the ground that the executory devise over was repugnant and void. And it was held, that he took an absolute interest under the gift, and that the attempted executory gift over was void for repugnancy.

The court (Kay, J.) cites *In Re Macleay*, *supra*, and notes the dissent therefrom in *In Re Rosher*, *supra*, and, after discussing the nature of the estate devised, and the differences between conditions, conditional limitations, remainders and executory devises, proceeds as follows (p. 182): "The events upon which the executory devise in this case is to take effect seem to be 1.

alienation, and 2. bankruptcy, or judgment and execution. The alienation contemplated is any alienation whatever by the devisee, not limited in any way. This is clearly invalid. With respect to the other event, bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple estate be divested by an executory devise on that event? The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee simple to A., were to declare that such estates should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person." And see *In Re Machu*, 21 Ch. D. 838; Gray, Res. on Alienation (2d ed.), § 22 and cases cited; 4 Kent's Comm. p. *131 (note); *Potter v. Couch*, 141 U. S. 296, 315 (*infra*), as to the invalidity of restraints by way of condition or limitation attempted to be imposed upon an estate in fee in the event of bankruptcy or insolvency or attack by creditors.

In *Mandlebaum v. McDonell*, 29 Mich. 79, where the court found that there was neither a strict condition with reverter, nor a conditional limitation over, but only a restriction upon all alienation for a limited time, we find the most comprehensive and satisfactory review of the authorities to be found in any of the cases cited. The authorities upon the subject of restrictions upon the right of alienation, and especially *Large's case*, 2 Leonard, 82; 3 Leonard, 182, are fully discussed; and the doctrine announced by some text writers and annotators, and supported by some *dicta* by judges, and perhaps by one or two American decisions, and which seems by all such to be referred finally to *Large's case*, that a restriction suspending all power of alienation of a vested estate in fee for a reasonable time only is valid, is held not to be sustained by that decision,

or by any other known English decision since the statute *quia emptores*. The learned court, after determining the nature of the estate devised by the will to be a vested remainder in fee, and after a general discussion of the nature of real estate and the incidents of estates therein, proceeds as follows (p. 94 *et seq*); "Coming now to a fee simple estate, the highest known to the law and its incidents, no one would contend that a condition in the conveyance of such an estate, that the grantee should not commit waste, nor take the profits, or that his wife should not have dower, or the husband curtesy, or that it should descend to executors, instead of heirs, or one half to female and the other to male heirs, without regard to the number of either, etc., would be valid.

"At common law, however, prior to the statute *quia emptores*, a condition against alienation would in England have been good, because prior to that statute the feoffor or grantor of such an estate was entitled to the escheat on failure of heirs of the grantee, which was properly a possibility of reverter, and was treated as a reversion; so that the vendor did not, by the feoffment or conveyance, part with the entire estate; but this reversion, dependent on this contingency, remained in him and his heirs, which gave them an interest to insist upon the condition and take the benefit accruing to them upon the breach.—2 Thomas' Coke Lit. 27, and *De Peyster v. Michael*, 6 N. Y. 467. (This is the fullest and ablest discussion of the whole question of restrictions upon the sale of estates in fee (except as to the question of time), and contains the most complete citation of authorities of any case I have found in the books, and relieves me from going over the general subject.) Whether the statute *quia emptores* ever became effectual in any of the United States by express or implied adoption, or as a part of the common law, we need not inquire, since it is clear enough that no such statute was ever needed in this state, if in any of the western states, as no such right of escheat or possibility of reverter ever existed here in the party conveying the estate; but the escheat could only accrue to the sovereignty, the state. And, therefore, the question of the right to impose

such conditions or restrictions stands here upon common law reasons, as it has stood in England since the statute in question.

“Going back to Littleton for the law as it was understood in England after the reversion had been taken away by the statute, in section 360, he states the general principle thus: ‘If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition be good, then the condition should oust him of all power which the law gives him, which should be against reason; and therefore such a condition is void.’ And Lord Coke, commenting upon this passage, says: ‘And the like law is of a devise in fee upon condition the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same; the same is void; because his whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic, and bargaining and contracting between man and man.’—*Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem, etc.* (Freely translated): It is a wrong to freemen to restrain the free alienation of their property.

“But Littleton, in section 361, makes this qualification: ‘But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such a condition is good.’

“Chancellor Kent, however, says (Co. Vol. 4, p. 131): ‘But

this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day' (citing the case of *Newkerk v. Newkerk*, 2 Caines' R., 345, where the condition that the devisee should continue to inhabit the town of Hurley was adjudged to be unreasonable). And certainly, in a country like ours, where lands are as much an article of sale and traffic as personal property, and the policy of the state has been to encourage both the acquisition and easy and free alienation of lands, such restrictions ought not to be encouraged by the courts. But the exception stated by Littleton in section 361, above quoted, was certainly pushed to its extreme verge (and beyond that warranted by any other English case), in *Doe v. Pearson*, 6 East, 173, where it was held that a condition against alienation, except to the sisters of the devisees or their children, annexed to a devise in fee, was good, and that the heirs of the deviser might recover on its breach. And I think there is much reason to doubt whether this case should be recognized as law here (if, indeed, it would be now in England. See *Attwater v. Attwater*, 18 Beav., 330); *Schermerhorn v. Negus*, 1 Denio, 448. But however competent it may be, under the authorities, to impose upon an estate in fee, a condition against alienation to certain specified persons, it does not follow, and the authorities upon the point have no tendency to show, that a condition against selling such an estate at all to any party or parties, for a long, or for any period of time, would be valid. And it is this latter species of condition or restriction only, and the authorities bearing upon it, that we are here considering. The restriction against selling to particular persons, or to any but certain specified parties, does not, if valid, suspend for a moment the power of sale, but a sale may be made at any time to parties not coming within the restriction. Now, neither Littleton nor Coke, nor any of the annotators of Coke upon Littleton (so far as I have been able to discover), has mentioned any such qualification of the general rule laid down by Littleton in section 360, nor anywhere intimated that such a condition against alienation for a particular time, or for a reasonable time, or for any time whatever, would be valid. And the same may

be said of the other approved English works upon real estate: *Blackstone's Commentaries*, *Sheppard's Touchstone*, *Bacon's Abridgment*, *Cruise's Digest*, *Comyn's Digest*, and all other English works which I have been able to examine. And if there is any English decision since the statute *quia emptores*, where the point was involved, in which it was held competent for a feoffor, grantor or devisor of a vested estate in fee simple, whether in remainder or in possession, by any condition or restriction in the instrument creating it, to suspend all power of the feoffee, grantee, or devisee, otherwise competent, to sell, for a single day, I have not been able to find it; and the able counsel for the defendants, whose research nothing of this kind is likely to escape, seem to have been equally unsuccessful. In making this statement I do not overlook *Large's Case*, 2 Leonard, 82; and 3 Leonard, 182, which by some elementary writers and annotators, and in some *dicta* by judges, and perhaps one or two decisions in this country, seems to have been understood as warranting such a restriction, and upon which all such elementary writers, annotators, and judges, who profess to rest such an opinion upon any authority, rely, but which I propose presently to show decides no such thing as to any vested estate of any kind.

"Neither Chancellor Kent, in his *Commentaries*, nor Mr. Hilliard, in his work on real property, recognize the validity of such a restriction, though they both notice all the others mentioned as good by Littleton, Coke, Cruise, Bacon, and Sheppard (or Mr. Justice Doderidge, whichever was the author of the *Touchstone*). And Bacon and Hilliard, as well as Fearne, Cruise, and the annotators upon Coke *super* Littleton, cite *Large's case* to another point which it does involve, but not to what we are now considering."

The court then proceeds to a review of the English and American cases, and concludes as follows: "We are entirely satisfied there has never been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law.

And we think it would be unwise and injurious to admit into the law the principle contended for by the defendant's counsel, that such restrictions should be held valid, if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the court of last resort; and upon what standard of certainty can the court decide it? Or, depending as it must upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury? The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void.

"Certainty in the law of real estate, as to the incidents and nature of the several species of estates and the effect of the recognized instruments and modes of transfer, is of too much importance to be sacrificed to the unskillfulness, the whims or caprices of a few peculiar individuals in isolated cases."

The case of *Mandlebaum v. McDonell*, *supra*, was approved and followed in *Bennett v. Chapin*, 77 Mich. 526, and *In Re Est. of Schilling*, 102 Mich. 612; and see Gray, Res. on Al. (2nd. ed.), p. 41, where Mr. Gray says: "In *Mandlebaum v. McDonell*, 29 Mich. 78, the court thought there was neither a condition nor a conditional limitation, but only a restriction on alienation within a limited time; but the opinion of Christiancy, J., holding the restriction bad, is the fullest argument against the validity of such conditions and conditional limitations to be found in the books. . . . Since the full discussion and the decision in *Mandlebaum v. McDonell*, followed and approved by *Re Rosher*, and *Potter v. Couch*, it is probably safe to say that the invalidity of restrictions against alienation of fees simple, though limited in time, is now established, except in the Province of Ontario."

In *Potter v. Couch*, 141 U. S. 315, 316, the court, in dealing with a restraint upon alienation for a period of twenty years

after testator's death, says, p. 315, per Mr. Justice Gray: "The testator having declared his will that the devisees of the shares shall be 'for the personal advantage of' the devisees, and that 'no creditors or assignees or purchasers shall be entitled to any part,' and having directed the devise over to take effect 'if either of the devisees shall in any way or manner cease to be personally entitled to the devise made for his benefit,' the devise over of the shares of the brother and the nephew, if valid, would take effect upon any alienation by the first devisee, whether voluntary or involuntary, by sale and conveyance, by levy of execution, by adjudication of bankruptcy, or otherwise; or, at least, upon any such alienation before his vested equitable estate became a legal estate after the expiration of the twenty years.

"But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Lit. § 360; Co. Lit. 206, b, 223 a; 4 Kent Com. 131; *McDonogh v. Murdoch*, 15 How. 367, 373, 375, 412. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable. *Howard v. Carusi*, 109 U. S. 725; *Ware v. Cann*, 10 B. & C. 433; *Shaw v. Ford*, 7 Ch. D. 669; *In re Dugdale*, 38 Ch. D. 176; *Corbett v. Corbett*, 13 P. D. 136; *Steib v. Whitehead*, 111 Illinois, 247, 251; *Kelley v. Meins*, 135 Mass. 231, and cases there cited. And on principle, and according to the weight of authority, a restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *Mandlebaum v. McDonell*, 29 Michigan, 77; *Anderson v. Cary*, 36 Ohio St. 506; *Twitty v. Camp*, Phil. Eq. (No. Car.) 61; *In re Rosher*, 26 Ch. D. 801."

And the court pointedly distinguishes such limitations im-

posed upon an estate in fee from the provisions of "spendthrift trusts," saying, p. 317: "The case at bar presents no question of the validity of a proviso that income bequeathed to a person for life shall not be liable for his debts, such as was discussed in *Nichols v. Levy*, 5 Wall. 433; in *Nichols v. Eaton*, 91 U. S. 716; and in *Spindle v. Shreve*, 111 U. S. 542."

In *Johnson v. Preston*, 226 Ill. 447, there was a devise to an executor for twenty-five years from the date of probate of the will in trust for A. and B., without power of alienation by the executor or A. or B. during said twenty-five years, except that A. or B. might convey one to the other. The court held that this provision was void as violating the rule against perpetuities, because the time, when the estate would vest in the executor, being dependent upon the probate of the will, might be postponed for more than twenty-one years after the death of the testator, there being no certainty as to when the will would be probated; that as the attempt to create a trust estate in the executor failed, the estate became vested in fee in the beneficiaries under the will at the death of testator; and with regard to the restraint upon alienation attempted to be imposed by the will, the majority opinion says (p. 462): "The general rule is that where a devise is made in fee either of a legal or an equitable interest, all limitations tending to deprive the estate of any of the incidents appertaining to the interest created are held to be repugnant to the devise and void. To transfer a fee, and at the same time to restrict the free alienation of it is to say that a party can give and not give in the same breath."

In *Schermerhorn v. Negus*, 1 Denio, 448, where a testator devised property to his six children for life, remainder to their children per stirpes in fee; and then restricted its alienation by the following clause: "Item. It is my true intent and meaning of this my last will and testament (anything herein contained to the contrary thereof in any wise notwithstanding) that no part or parcel of the real estate herein above by me devised shall be sold or alienated by any of my above named children, or by any of their descendants or posterity, except it be to each other, or to their and each of their descendants,

upon pain that he, she or they shall forfeit the same and be debarred of holding any part thereof." The court in its opinion did not mention the rule against perpetuities, but held the restriction to be invalid as being repugnant to the nature of the estate devised, citing: 4 Kent's Com. 131, *Newkerk v. Newkerk*, 2 Caines, 345, 2 Cr. Dig. 6; *M'Williams v. Nisly*, 2 Serg. & Rawle, 513, Co. Litt. 222, 223.

In *Bing v. Burrus*, 56 S. E. (Va.) 222, there was a devise of land to be equally divided among the testator's three sons, with the following proviso: "I further desire and direct that, if either of my sons above mentioned desires to sell his part of the land, the preference of purchase shall be given to one or both of his brothers above mentioned, provided they will pay as much for the land as can be obtained for it from an outside party," &c., and provides for time to be given for payment. It was held that the clause giving a preference of purchase to the other brothers did not deprive the devisee of the absolute power of sale of his share.

In *M'Cullough's Heirs v. Gilmore*, 11 Pa. St. 370, there was a devise to W. in fee, "laying this injunction and prohibition not to leave the same to any but the legitimate heirs of his father's family at his decease." Page 373, the court comments on this word "family," as follows: "In this case, however, the restriction is uncertain. Whom did the testator mean by the heirs of his *father's family*? A man's family may be considered as his household at a particular period; or as his race or generation. There is nothing in the will to designate or describe what the testator meant by his father's family. A family in its collective or aggregate capacity can have no heirs. We are, therefore, all in the dark as to whom the testator intended to designate by the use of the words 'heirs of his father's family.' We may, perhaps, indulge a reasonable conjecture that he intended to describe the heirs of his father. If so, as William had never married, and left brothers and sisters, and children of deceased brothers and sisters, who were the legitimate heirs of his father, and who were also his own heirs, the devise would then be to William and his heirs, and a restriction,

that he should not devise it to any but his own heirs. Such a restriction would be totally inconsistent with a reasonable enjoyment of the fee and hostile to the characteristic qualities of a fee. No case has carried the doctrine of partial restraint upon alienation to anything like the length that this would go. It is necessary that the symmetry of a fee-simple estate should be preserved. It is the simplest and best form of estate, for the structure of our social condition. The testator had a manifest general intent to give a fee-simple in the land to his brother William; he had an obscure, uncertain, and ill-defined particular or secondary intent in relation to the power of alienation, which would be inconsistent with a reasonable enjoyment of the fee, and which is therefore void; and void also for uncertainty."

In *Pardue v. Givens*, 54 N. C. 306, the testator devised in fee to his children, and desired that his children should continue to live upon the land devised to them. The will provided that in case they sold the land, or did not abide upon it, their share should go to the others, and it was held that this attempted restraint on alienation was void.

In *Anderson v. Cary*, 36 Ohio St. 506, there was a devise to the two sons of the testator upon the condition that they should not be allowed to dispose of the property until the expiration of ten years from the time one of the sons arrived at full age, except to one another. The court held that the attempted restraint was invalid, and said: "The owner of property cannot transfer it absolutely to another and at the same time keep it to himself. We fully admit that he may restrain or limit its enjoyment by trusts, conditions or covenants, but we deny that he can take from a fee simple its inherent alienable quality and still transfer it as a fee simple."

After the above extended review of the cases, which seems to be necessary, or at least consistent, in view of the fact that the questions here presented are of first impression in this State, it will be convenient to repeat the language here under consideration, with a view to the determination of its scope and effect, and of the rules of law, to be deduced from the cases, by which

the question of its validity or invalidity should be governed.

The second paragraph of the second clause of the will of the testatrix, as amended by the first clause of the codicil, is as follows (with the change of parenthesis, to accord with our previous construction): "And I further provide and declare that all the devises hereinabove made of portions of my Pojac Point Farm, and also those hereinafter made in the third clause of my will of my farm called Tanglewood, are made upon the condition that if any of my children or grandchildren shall voluntarily or involuntarily alienate or devise the portion of said lands set apart to him or to her other than to some descendant of mine (except for life to the wife or husband of some descendant while such descendant may be living) and without the consent of all my descendants, who shall at the time be of full age and competent to convey and devise real property, in such event the interest of such child or grandchild therein shall cease and be determined and such estate shall thereupon vest in my other descendants then living *per stirpes* and not *per capita*."

(7) As preliminary to the particular discussion of the language above quoted, it would be well to consider for a moment what meaning or force should be attached to the words "*power of alienation*," or "*right of alienation*," spoken of by all the authorities as incident to the ownership of an estate in fee-simple. We regard the words "*power*" or "*right*," so used, as of much greater significance than would seem to be attached to them by some of the cases above cited. We conceive the power or right of alienation to include the power or right to dispose of property held in fee, in such manner as the owner sees fit, whether by direct gift, by settlement in trust or by will, or by sale at a price to be fixed by the owner at private sale, or by sale at public auction, or by lease, mortgage, or other mode of conveyance, so that the purpose of the owner thereof in its disposition may be carried out, whether it be a purpose of benevolence, or a purpose to obtain value therefor up to the full market or adequate value thereof; and as further incident to such power or right, that an estate in fee simple vested in the

owner should be subject to the owner's debts and liabilities, so that the owner's creditors may be enabled to avail themselves thereof through bankruptcy or insolvency proceedings or by ordinary process of law or suit in equity. We do not conceive that the meaning of the words "power" or "right" of alienation is in anywise satisfied, when, by reason of attempted restraints upon alienation, there exists only a possibility or even a probability that the owner may be able to dispose of his property by sale to some one or more of the descendants of his mother (if any one or more of them will buy it), at some price or other (if any one or more of them can and will afford to pay for it); or by gift to one or more of them (if one or more of them will accept it); or by devise to one or more of them. Nor do we conceive that any "power" or "right" of alienation, in the proper sense of the words remains, when the owner is forbidden to alienate or devise to any one except descendants, "without the consent of all my descendants . . . of full age and competent," &c. The most that can be said of this latter provision is that it suggests a way by which alienation to others than descendants *may* be made, if every one of a large number of relatives gives consent; so that any one person of that class can absolutely prevent alienation if he or she wishes to do so. It is an entire misuse of language, when we are considering the provisions here in question, to say that any "power" or "right" of alienation is left in the first takers as devisees under the will; the "power" or "right" to *prevent* alienation by any first taker absolutely, or to *permit* it, if they see fit, is given to the other "descendants;" there remains in the first taker only a possibility of being able either to give away or sell his estate, dependent upon the willingness or ability of any one or more of the "other descendants" to accept the gift or purchase the estate; or upon the consent of all of them, being "of full age and competent," &c., to alienate or devise to anyone other than a descendant. The only "power" or "right" which can, by any fair construction of the language, be said to remain in the first taker, is the power or right to devise "to some descendant of mine;" so that while the testatrix, as we have construed the will,

gave to each of her children an estate in fee, she has attempted to take away from each of them all "power" or "right" of alienation, substituting therefor the control, or consent, of the others or their descendants; and only leaving them the "right" to devise to some other descendant. A careful examination of the cases above cited shows that only in the English case of *Doe v. Gill v. Pearson* (*supra*), and some of the Canadian cases which follow the same general doctrine, has any such general restraint upon alienation, imposed upon a fee-simple, as in the case at bar, been sustained as valid; that in *In Re Macleay*, *supra*, and in the Canadian cases which follow its doctrine, the restraints sustained as valid were more limited in their scope and effect than those here under consideration; and that the authority of both the above English cases has been so far destroyed by the much better considered cases of *Attwater v. Attwater*, *supra*; *Billing v. Welch*, *supra*; *Re Rosher*, *supra*; *Re Dugdale*, *supra*; and *Mendlebaum, v. McDonell*, *supra*, that it is doubtful whether they would now be regarded as sound law even in England; and we are of the opinion that they are entirely without weight as authority in this country. We find no case in this country where any such general restraint upon alienation has been supported as valid; on the contrary, we find that in each of the few cases cited where any such general restraints upon alienation have been considered, they have always been held to be invalid. The restraints considered in *In Re Rosher*, 26 Ch. D. 801; *De Peyster v. Michael*, 6 N. Y. 467; *Bing v. Burrus*, 56 S. E. (Va.) 222, where conditions were imposed restraining alienation until after option of purchase had been given by the owner, were in some respects less general and absolute than those in the case at bar, because in the last mentioned cases there was a certainty that the owner could sell his estate at some price, either to the holder of the option of purchase or, if that option were offered and refused, then to anyone else who would buy; while in the case at bar, as we have seen, the owner may not be able even to give it away, except by devise to a "descendant."

There remains to be considered the restraint upon "involuntary" alienation, which we take to mean and include such

alienation as would result from attachment, levy, and sale for taxes or other debts due from the owner, or from proceedings in bankruptcy, insolvency, or otherwise, whereby the owner would be deprived of his interest in the property for the benefit of a creditor or creditors. No case is cited where a restraint of this character imposed upon an estate in fee-simple has been sustained. On the contrary, we are of the opinion that the law is well settled, both in England and in the United States, that such restraints are void. See *In Re Dugdale*, 38 Ch. D. 176 (*supra*); *In Re Machu*, 21 Ch. D. 838; Gray, Res. on Alienation (2d ed.), § 22 and cas. cit.; 4 Kent Comm. p. *131 (note) (12th ed.); *Potter v. Couch*, 141 U. S. 296, 315 (*supra*).

While we find no case cited where the restraints imposed were so similar in all respects to those in the case at bar that a further comparison would be useful, we are of the opinion, in answer to the first question certified to this court for determination, that the restraints here under consideration are so general, and so nearly absolute in their character, that they should be held to be invalid under the general doctrines so ably set forth in the cases above cited beginning with *In Re Rosher* (*supra*); and that, even under the test suggested by Jessel, M. R., in *In Re Macleay* (*supra*), the restraints imposed in this case do take away "the whole power of alienation substantially" and are therefore repugnant and void.

We come now to the consideration of the second question certified to this court for determination, viz.: "2. If the restraint on alienation imposed by the second paragraph of clause 'second' of the will of said Katharine C. Welling as amended by the 'First' clause of the codicil is invalid, are the 'Second' and 'Third' clauses of said will as amended by the 'First' clause of said codicil thereby rendered wholly invalid and of no effect, or are said clauses as thus amended valid as a devise of the real estate therein mentioned free from the restraint upon alienation?"

The general intent of the testatrix in respect to this devise is very clear. She desired that her six children should have adjoining portions of her two estates in North Kingstown as

sites for country homes in proximity to each other, in the hope that this would result in promoting affectionate relations between her children and grandchildren. She entrusted the power of apportioning the property to two of her sons, executors of the estate, and directed that they should allot to each of her children a portion of the Pojac Point Farm and Tanglewood estates, such portions to be "approximately equal to each other in area." She then sought to further her purpose by enjoining the first takers of each portion of real estate from disposing of such property to any one not in the family, unless all her descendants should consent to alienation to other persons.

- (5) This restraint on alienation was only incidental to her general scheme of making provision for her children. She attempted to impose it only upon the first devisees of the property; she did not intend that it should be operative beyond the first generation of those who took the property. It was merely intended to aid her controlling desire that her children should share in these two estates, and her intention that this property should be apportioned and allotted by her executors among her children. It was a mere detail in carrying out her testamentary scheme.

The counsel for certain respondents, however, have urged that if the testatrix had known that the alienation clause of the will would be declared invalid, she would never have given her children portions of the two estates "approximately equal to each other in area." This, however, is at most only conjectural, and we find no ground for holding that the intention of the testatrix to impose these restraints upon alienation was so far an inseparable and integral part of her general testamentary plan that she would not have made these devises if she had been advised that she could not lawfully restrain alienation in the way she proposed. We find that her main purpose was to provide that each of children, or the issue of any deceased child, should have parts of her two estates approximately equal in area in order that they might have neighboring sites for country homes. Her general intention, therefore, should be made ef-

fective, and such incidental feature as is here held to be void should be disregarded. *Bailey v. Brown*, 19 R. I. 669.

- (6) ' The rule of law applicable to this phase of the case is clear. Where invalid portions of a will can be separated from that which is valid, without doing violence to the general testamentary scheme, the invalid clauses will be disregarded and those that are valid will be upheld. Clauses imposing unlawful restraint on alienation are seldom inseparably attached to the general testamentary plan and consequently they may be rejected and the devise remain operative in all other respects. *Oxley v. Lane*, 35 N. Y. 340; *Henderson v. Henderson*, 113 N. Y. 1; *City of Phila. v. Girard's Heirs*, 45 Pa. 9; *Outland v. Bowen*, 115 Ind. 150; *Johnson v. Preston*, 226 Ill. 447 (*supra*); *Bradley v. Peixoto*, 3 Ves, Jr. 324; Gray: Rule against Perp. § 247; 24 Am. & Eng. Ency. of Law, p. 872 (2d ed.).

We therefore hold, in reply to the second question, that clauses "Second" and "Third" of the will of said Katharine C. Welling, as amended by the "First" clause of the codicil, are valid as devises of the real estate therein mentioned, free from the restraint upon alienation.

In view of the foregoing, the third question needs no answer.

John Henshaw, for complainants.

Gardner, Pirce & Thornley, Rathbone Gardner, Charles R. Haslam, for respondents William Brenton Welling and Richard W. G. Welling.

Green, Hinckley & Allen, for Emily Welling Hayes and J. Noble Hayes.

WILLIAM GREENE by Guardian *et al.* vs. THOMAS W. D. RATHBUN Admr., *et al.*

JANUARY, 11 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Wills. Charge for Support. Legacies.*

Testamentary devise to X. of the residue for life "she to support and furnish my son Y. in sickness and in health with board and clothing and see that

he is well provided for and taken good care of during his natural life. I hereby bind all the real estate and personal property given to X. to secure his support; after the death of X., I give devise and bequesth unto the children of my son Z. all the remainder of my real and personal estate to be divided in equal shares between them, to them their heirs and assigns, they being bound to the support of my son Y. in case of the death of my daughter X." X. was appointed executrix, and performed the conditions until her decease, whereupon an administrator was appointed. The questions to be determined were as to the rights of Y., in and to the estate devised and bequeathed to the children of Z., and as to whether the support of Y. was a charge upon the real and personal estate, and whether the guardian of Y. was entitled to receive from such estate, or from said devisees in remainder and said administrator, the amount which the guardian had applied from the separate estate of his ward Y.

Held, that Y., by virtue of the provisions for his support for life, stood in the relation of legatee to the estate, and that the legacy was an express charge upon all the residuary estate to secure such support during the life of Y., and the residuary devisees were entitled to nothing except what was left after the legacy to Y. was paid.

(2) *Same.*

Held, further, that the administrator should hold the personal estate charged as above, until after the death of Y.

Held, further, that, while it was the intent of testator that Y. should reside and be supported upon the homestead property, his guardian could exercise a proper discretion as to his future place of abode.

(3) *Remainders.*

Held, further, that the remainder created by the will vested at the death of testator in all the children of Z. then living, subject to open and let in any children of Z. born after the death of testator, and before the death of X., the life tenant.

(4) *Vested Remainders.*

One of the children of Z. was living at the death of testator, but deceased intestate without ever having issue born alive, and leaving her father Z. and husband her surviving.

Held, that she became entitled at death of testator to a vested remainder in an undivided part of the residuary real estate, which passed to her father Z. as sole heir at law, and which, upon his death intestate, passed to his heirs at law, viz.: all his remaining children, while as to that portion of the residuary personal estate, her husband became entitled to administer upon her estate, and might hereafter become entitled to demand as such administrator such proportional part of such estate as she would have been entitled to, if she had survived, at the time of its distribution.

(5) *Guardian and Ward. Charge for Support.*

Held, further, that the guardian of Y. was entitled to recover from the administrator, out of the personal estate, such an amount as should be shown to have been necessarily and properly expended for his support, out of his

own individual estate, so that such individual estate might be reimbursed for any depletion caused by the failure of the residuary devisees to furnish him with support under the terms of the will.

(6) *Charge for Support. Sale of Real Estate.*

Held, further, that, as the personal estate appeared to be ample for the support of Y., owing to his advanced age, it was unnecessary at this time to decree sale of the real estate.

BILL IN EQUITY, for construction of will. Certified to Supreme Court.

PARKHURST, J. This is a bill in equity praying the construction of the will of Reynolds Greene, late of North Kingstown, deceased.

The bill was filed in the Superior Court for Washington county, and answer made thereto by the several respondents, admitting all of the essential allegations of the bill; and the cause, then standing for hearing upon bill and answer by the Superior Court, was certified to this court for its determination as being a cause ready for hearing for final decree, and as being a bill for the construction of a will, in accordance with the statute in such case made and provided (Gen. Laws, 1909, cap. 289, § 35).

The essential facts as alleged and admitted by the bill and answers are, that the testator Reynolds Greene deceased at North Kingstown on the 29th day of March, 1881, leaving a last will, with a codicil, which was duly probated June 28th, 1881; that Rachel R. Greene was by the will named as executrix, and was duly appointed and qualified as such and acted in that capacity during her lifetime; that said Rachel R. Greene died on the sixth day of September, 1905, and that the respondent, Thomas W. D. Rathbun, was duly appointed administrator, d. b. n., c. t. a., in succession to the said Rachel R. Greene, deceased, and duly qualified, and is now acting as such; that at the time of the demise of the said testator, his son, Oliver W. Greene, had then living children as follows, to wit: Walter R. Greene, one of the complainants; Thomas A. L. Greene; Sarah L. Curtis; Samuel W. Greene; Oliver W. Greene; and Elizabeth Greene Nichols, wife of Joseph B. Nichols; that after

the death of the testator there was born to the said Oliver W. Greene, James H. Greene, born July 29th, 1882, and Lottie B. Greene (now Rouse), born September 17th, 1887; that the testator's said son Oliver W. Greene died June 10th, 1895, intestate, and said Elizabeth Greene Nichols had died February 25th, 1884, intestate, and without ever having issue born alive to her, leaving her father, the said Oliver W. Greene, son of the testator, her sole heir-at-law, and was also survived by her husband, the respondent, Joseph B. Nichols; that at the time of the death of said Rachel R. Greene all of the said children of Oliver W. Greene, the son of the testator, save Elizabeth Greene Nichols, were living; that by the said last will and codicil of the testator there was devised to Rachel R. Greene all the rest and residue of his real and personal estate for and during her natural life, in the words following, to wit: "give, devise and bequeath unto my daughter Rachel R. Greene all the rest and residue of my real estate and personal property for and during her natural life she to support and furnish my son William Greene in sickness and in health with board and clothing and see that he is well provided for and taken good care of during his natural life. I hereby bind all the real estate and personal property given to my daughter Rachel R. Greene to secure his support as aforesaid after the death of my daughter Rachel R. Greene I give, devise and bequeath unto the children of my son Oliver W. Greene all the remainder of my real and personal estate to be divided in equal shares between them, to them their heirs and assigns they being bound to the support of my son William Greene in case of the death of my daughter Rachel R. Greene as aforesaid;" that the residuary estate so devised and bequeathed to the said Rachel R. Greene for her life consisted of the east half of the Roomes farm with the homestead thereon lying easterly of the Boston Neck road in the town of North Kingstown, and of personal estate, as shown by her inventory filed in the Probate Court, amounting to \$11,524.45; that Rachel R. Greene during her lifetime kept and performed the conditions attached to the devise and bequest; that the respondent administrator is possessed as such administrator, succeeding

said Rachel R. Greene, of personal estate of said Reynolds Greene of the value of \$9,615.19, as of December 3, 1909, the date of the oath to the answer; that upon the death of Rachel R. Greene, Walter R. Greene was appointed guardian of the person and estate of Wm. Greene, and has now in his possession of the personal estate of his ward, the sum of \$8,500.00, not, however, derived from the estate of Reynolds Greene; that since the death of Rachel R. Greene and the appointment of the guardian of William Greene, said guardian, under the advice and order of the Probate Court of North Kingstown, has applied the sum of \$10.00 per week out of the estate of William Greene for his support and maintenance; that a difference of opinion has existed between the complainants and respondents as to the rights of William Greene in and to the real and personal estate devised and bequeathed to the children of Oliver W. Greene; and as to whether the support of William was and is a charge upon the real and personal estate and whether said guardian is entitled to have and receive from said real and personal estate, or from said devisees in remainder and said administrator, the sum said guardian has applied from said ward's estate, to wit, the sum of \$2,000.00.

And the bill prays that said will be construed by the court as regards the following questions, viz.:

1. Did the devise and bequest in remainder in said Reynolds Greene's will vest in the children of Oliver W. Greene living at the time of death of said Reynolds Greene?

2. Did the said children born to Oliver W. Greene after the death of said Reynolds Greene take any estate under his will?

3. Has William Greene the right to have and recover the sum applied by his guardian aforesaid to his support, out of the said real estate and personal estate?

4. Did the said real and personal estate vest in the children of Oliver W. Greene, the son of said Reynolds Greene, which were living at the time of said Reynolds Greene's death, or did it vest in said children of Oliver W. Greene living at the time of the death of said Rachel R. Greene?

And the bill further prays that, if the court is of the opinion

that said William Greene has the right to have and recover the sum applied by his guardian to his support out of said real and personal estate, that an order and decree be made that the same be paid by such of the respondents as are liable to pay the same; and by said decree, to charge the same as a lien and charge upon said real and personal estate; and, upon the parties charged, not paying the same, to direct the application of said personal estate to the payment of the same, or the sale of said real estate for the satisfaction of the same out of the proceeds of the sale thereof; and that the court further order and decree that such certain sum as this court shall deem just for the future support of said William Greene shall be fixed and charged as a lien on such of said real and personal estate as may remain, and providing time for payment.

The answer of the respondent Rathbun, administrator, admitting substantially all of the essential allegations of fact as above set forth, joins in the prayer for the determination of the rights of the respective parties to the bill.

The other respondents, by their joint and several answer, admit all of the essential allegations of fact as above set forth, and pray for the determination of the following questions, viz.:

(a) Was the devise and bequest in remainder in the will of the aforesaid Reynolds Greene to the children of Oliver W. Greene to only such as were living at the demise of said testator, or was the aforesaid devise and bequest to such children as a class and became determined and fixed at the demise of Rachel Greene?

(b) Did there vest in each child of the said Oliver W. Greene a remainder in the estate devised and bequeathed under the will of said Reynolds Greene, and this so continue as children were born unto the said Oliver W. Greene and until the decease of the aforesaid Rachel Greene?

In order to the proper and orderly determination of the questions above set forth, it becomes necessary and proper, for the protection of the defendant Rathbun, administrator, to determine first, at his request, the following matters, viz.:

(1) The nature of the interest which William took under the will?

(2) Whether all the residuary estate, both real and personal, is charged with the payment of said interest?

(3) Whether said charge continues during the lifetime of William or ceased at the death of Rachel?

(4) Whether the residuary estate can be distributed prior to the decease of William?

(5) Whether it was the intention of the testator that William should be maintained on the premises where he lived at the time of testator's death?

The will provides that William is to be "supported," to be furnished "in sickness and in health with board and clothing," to be "well provided for and taken good care of during his natural life." This is in effect a legacy to William.

In *Farwell v. Jacobs, Adm.*, 4 Mass. 634, Parsons, C. J., in speaking of a direction in a will to the executor "to support the testator's aged father in sickness and in health," said: "The direction to support and maintain the plaintiff results from the bounty of the testator declared in his will, and must be considered, as to the remedy, as a legacy."

- (1) The case of *Baker v. Dodge*, 19 Mass. (2 Pick.) 619, is similar. There the devise of the residuary estate, both real and personal, was on condition that the devisee should support the testator's daughter in health and sickness during her life. The devisee died, and the action was brought against the administrator *de bonis non* of the testator. Parker, C. J., said: "The question is, whether the provision in the will of Cornelius Baker in favor of the plaintiff in this action is of the nature of a legacy, so as to entitle her to recover against the present representative of the testator, and to have a satisfaction of her judgment out of the effects of the deceased. And we are all of opinion that such is the nature of the testamentary provision," citing and following *Farwell v. Jacobs, supra*. See also *Wood v. Barstow*, 10 Pick, 368; *Emery v. Swasey*, 97 Me. 136 (cited *infra*); *Jordan v. Donahue*, 12 R. I. 199.

We find, therefore, that William, by virtue of the provisions

for his support for life, stands in the relation of legatee to the estate of his deceased father.

We think it is clear that it was the intention of the testator to make such legacy an express charge upon all the residuary estate to secure the support of William as long as he lived. His words are: "I hereby bind all the real estate and personal property given to my daughter Rachel R. Greene to secure his support as aforesaid." The real estate and personal property given to Rachel and referred to in this sentence was "all the rest and residue of my real estate and personal property," and included the homestead estate and the bank accounts, which at the present time compose the whole estate. It should be noted that it was not the life interest of Rachel in this rest and residue, but the "real estate and personal property" itself, that the testator charged to secure William's support.

Moreover, it is well settled that even if the testator had not expressly bound the real estate and personal property to secure William's support, nevertheless his maintenance, being in the nature of a legacy, would have been a charge upon the entire residuary estate, real and personal. Rachel took her life interest under a general residuary clause, and the children of Oliver take their interest in remainder also under the same general residuary clause. In either case the residuary devisees are entitled to nothing except what is left after the legacy to William is paid. *Lapham v. Clapp*, 10 R. I. 543; *Martin, Petitioner*, 25 R. I. 1; *Tyler v. Tallman*, 29 R. I. 57, 63.

In *Tyler v. Tallman*, 29 R. I. 57, at p. 63, it was said as follows: "The effect of placing realty with the residue was to subject it to the general rule governing residuary estate. The rule is well stated in Hill on Trustees, 4th Am. ed. *p. 360. 'It is clearly settled that where a testator gives several legacies, and then without creating any express trust for their payment makes a general residuary disposition of the whole estate, *blending the realty and personalty together in one fund*, the real estate will be charged with the legacies; for in such case the "residue" can only mean, what remains after satisfying the previous gifts.' This doctrine has been recognized and followed

in *Lewis v. Darling*, 16 How (U. S.), 1, 10 (1853); *Gould v. Winthrop*, 5 R. I. 324 (1858); *Lapham v. Clapp*, 10 R. I. 543 (1873); *Mathewson & Arnold, Petitioners*, 12 R. I. 145 (1878); *Phillips v. Clark*, 18 R. I. 630 (1894); and *In re Will of Francis Willis*, 25 R. I. 336 (1903); as well as in the numerous cases cited in the opinions in the foregoing cases."

It follows, from what has been said, that the charge for the benefit of William continues during his life and is upon the whole residuary estate, both real and personal, and that such charge did not cease at the death of Rachel R. Greene. It seemed from the answers of the respondents, children of Oliver W. Greene, that they intended to take the position that such express charge for the benefit and support of William was to be regarded as terminated at the death of Rachel R. Greene, and that it was the intention of the testator that after Rachel's death the estate should no longer be bound; but only that the children of Oliver should be personally bound. We do not, however, find any such contention in the brief or argument for said respondents, and in any event, as we have shown, such a contention is clearly untenable. The duty of supporting William is clearly imposed first upon Rachel so long as she lives; and if William should outlive Rachel, then such duty is just as clearly imposed upon the children of Oliver; and by the plain language and manifest intention of the will, the charge upon the residuary estate is made coextensive with the duty. The death of one person, upon whom the duty was first imposed, has no effect to relieve the residuary estate from the charge where the intention to charge the entire residuary estate is manifest. See *Dodge v. Hogan*, 19 R. I. 4, 7, 8; *Jordan v. Donahue*, 12 R. I. 199, 200; *Clapp v. Clapp*, 6 R. I. 129, 136; *Emery v. Swasey*, 97 Me. 136.

- (2) As to the time when the respondent Rathbun, administrator, should be required to distribute the personal estate in his hands, we agree with the contention made by his counsel, that he should hold the personal estate now in his hands, charged as above shown, with the support and maintenance of William, until after the death of William. It is impossible to determine what portion of the residuary estate may be needed for

the support of William. It is not a fixed amount. The whole residuary estate may be consumed, and there may be nothing for distribution at the death of William. On the other hand, it is conceded that William is a very old man, upwards of eighty years of age, although his exact age is not shown by the pleadings, so that his expectation of life is comparatively short. We do not find in the answer of the respondents (children of Oliver W. Greene), nor in the brief arguments submitted in their behalf, any definite claim that such personal estate should be immediately distributed; and we are of the opinion that the charge upon such personal estate may be better and more conveniently secured upon the same in the hands of said administrator than in any other manner. The case, in this aspect of it, is quite analogous to the case of *Lapham v. Clapp*, 10 R. I. 543, where it is said (p. 544): "We therefore declare the legacy to be a charge upon the money in the hands of the executor, and instruct him to employ the same, so far as it will go, in satisfaction of the legacy. We also declare that the legacy is a charge upon the real estate."

The respondent administrator further contends that it was the intention of the testator that William should be maintained and supported upon the homestead estate, devised to Rachel for her life, and after her death to the children of Oliver W. Greene. Although such intention is nowhere in terms expressed in the will, we think it may be said that such was the general intent of the testator, to be drawn from an examination of the various provisions. The testator imposed the burden of maintaining William upon the devisees in succession entitled to the homestead. By the original will, John was given the homestead, and was to support and maintain William from the profits of the estate. John died and the codicil was executed. In the codicil Rachel was given the homestead, she to support and furnish William in sickness and in health with board and clothing, and see that he is well provided for and taken good care of during life. After Rachel's death the children of Oliver were given the homestead, and were to carry out the terms of the will in respect to Wil-

liam's support. And both the real and personal estate were expressly charged with such support during the life of William. Further, it is stated in argument, and not denied, that the devisees in remainder have acted upon this construction of the will, and since the death of Rachel have attended to William's care and furnished him with board and clothing upon the homestead estate. It was also the construction placed upon the document by Rachel, when, with the permission of the Probate Court, she applied a large portion of the personal estate in constructing a new house upon the homestead property for herself and William.

This aspect of the case is quite analogous to the case of *Emery v. Swasey*, 97 Me. 136. There a testator devised to his sister H. and her husband, and the survivor, his homestead farm, to hold during their natural lives and the life of the survivor, "subject however to the obligation to furnish a comfortable home and maintenance for my sister E. during her natural life." On the death of the survivor, testator devised the farm to his nephew for life, and on his decease to other relatives, but did not mention the maintenance of his sister E. in such devises. E. was very old and without any home, and testator had provided a home for her for fourteen years before his death; it was held that the testator clearly intended that his sister E. should have maintenance on the homestead farm, and that the legacy to her was a charge on the property, and followed it into the hands of every life-tenant who accepted the devise of the homestead. See also, to similar effect, *Parker v. Parker*, 126 Mass. 433; *Van Blarcom v. Van Winkle*, 36 N. J. Eq. 103.

While it appears that it was the general intent of the testator that William should continue to reside and be supported upon the homestead property, we do not mean to be understood as holding that under any and all circumstances he must be kept there. So far as anything appears in the case, it is still as proper for his well-being that he should now remain there, as it was during the life of Rachel R. Greene. Circumstances, may, however arise in which it would not be proper that he be compelled to remain there; and we do not hereby

intend to hamper his guardian in the proper exercise of discretion as to his future place of abode.

- (3) We proceed now to answer the specific questions propounded by the bill and by the answer of the children of Oliver W. Greene. Stripped of unnecessary verbiage and repetition, so as to state the real questions involved with clearness and precision, questions 1, 2, and 4 propounded by the bill, and questions (a) and (b) propounded by the answer, should be consolidated and stated as follows:

Did the will of Reynolds Greene, by the words "after the death of my daughter Rachel R. Greene, I give, devise and bequeath unto the children of my son Oliver W. Greene all the remainder of my real and personal estate to be divided in equal shares between them, to them their heirs and assigns," . . . create a remainder which vested, at the death of the testator, in those children only of Oliver W. Greene who were living at the death of the testator, to the exclusion of those born afterwards during the life of Rachel R. Greene, or did it create such vested remainder in those children of Oliver W. Greene living at the death of the testator so that such remainder would open to let in such children of Oliver W. Greene as were born after the testator's death and before the death of the life-tenant?

The only remaining question (being question 3, in the bill) is—"Has William Greene the right to have and recover the sums applied by his guardian aforesaid to his support, out of the said real estate and personal estate?"

There is no doubt that the remainder created by the will by the words above set forth vested at the death of the testator in all of the children of Oliver W. Greene then living, subject to open and let in the children of Oliver W. Greene born after the testator's death and before the death of Rachel R. Greene, the life-tenant. The law is well stated in *Moore v. Dimond*, 5 R. I. 121, at p. 129, as follows: "Now the rule is, that where a devise is made to a class of persons, as to children, and no time is fixed by the testator, if the gift is to take effect immediately in possession, the estate vests immediately on the

testator's death in all those who are living. They all take a vested interest. 2 Jarm. on Wills, p. 75, and cases there cited. And where a particular estate is first given, and a devise over to children, the rule is the same as to those then living. Ib. The only difference is, that in the last case (which does not exist in the case before us since none of the children were born after the testator's decease,) that though the entire remainder vests in the children living at the death of the testator, it is nevertheless subject to be divested so as to let in such children as may be born after the testator's death, and before the period when it is to vest in possession and be distributed. 8 Ves. 375; 10 East, 503 a; 4 Madd, 495; 7 Metc. 300. In both cases the remainder vests equally."

In *Weston v. Foster*, 7 Metc. 297, 300, it was held as follows (p. 300): "This being a devise to John for life . . . with remainder in fee to the children of Daniel R., Thomas and Henry, there being children of these sons then living, it was a vested remainder, and vested in them at the time of the death of the testator. But as it was intended for the equal benefit of all the children coming within the description, it would open to let in after-born children. *Dingley v. Dingley*, 5 Mass. 537."

The same rule of construction has been fully approved in *Fosdick v. Fosdick*, 6 Allen, 41, 44; *Hatfield v. Sohler*, 114 Mass. 48; *Gibbens v. Gibbens*, 140 Mass., 102; *Dole v. Keyes*, 143 Mass. 237, 238; *Ballard v. Ballard*, 18 Pick. 41, 44; and see to the same effect *Rudebaugh v. Rudebaugh*, 72 Pa. St. 271; *Field v. Peebles*, 180 Ill. 376.

- (4) As to the interest of Elizabeth Greene Nichols, one of the children of Oliver W. Greene, who was living at the death of her grandfather, Reynolds Greene, the testator, March 29, 1881, who was the wife of Joseph B. Nichols, and who died Feb. 25, 1884, intestate and without ever having issue born alive to her, leaving her father Oliver W. Greene, surviving her, and leaving also her husband Joseph B. Nichols surviving her, it can not be doubted that she became entitled at her grandfather's death to a vested remainder in an undivided part of the resid-

uary real estate, which passed to her father as sole heir-at-law, and which, in turn, at his death, June 10, 1895, intestate, passed to his heirs-at-law, to wit, all his remaining children hereinbefore named; while as to that portion of the residuary estate which consisted of personal property, it can not be doubted that, she having died intestate and her husband surviving her, her husband, Joseph B. Nichols, became at her death and thereafter entitled to administer upon her estate; and that he may hereafter become entitled to demand and receive, as her administrator, if he should see fit to qualify as such, such proportionate part of the said personal property as Elizabeth Greene Nichols would be entitled to receive (if she had survived) at the time of the distribution thereof. *Shattuck v. Stedman*, 2 Pick. 468; *Ballard v. Ballard*, 18 Pick. 41, 44; *Weston v. Foster*, 7 Met. 300; *Gibbens v. Gibbens*, 140 Mass. 102, 106; *Lombard v. Willis*, 147 Mass. 13.

The pleadings do not disclose whether the said Joseph B. Nichols has ever been appointed and qualified as administrator upon the estate of Elizabeth Greene Nichols; so that we are unable, in this state of the case, to decide whether, in fact, said Nichols is or will be entitled to demand and receive such share of the personal estate in the hands of respondent Rathbun as his wife would in the future be entitled to receive if she had survived. As we have before decided, inasmuch as this personal estate, in the hands of Rathbun, administrator, is, together with the real estate, subject to a charge for the support of William Greene, such personal estate will be allowed to remain in the hands of said administrator, subject to said charge, until after the death of William Greene, in order that it may be possible to ascertain with certainty how much will then remain subject to distribution.

- (5) As to the question, "Has William Greene the right to have and recover the sum applied by his guardian aforesaid to his support, out of the said real estate and personal estate?" we do not find it possible to give a direct and positive answer.

The case, as made upon the bill and answers, does not disclose whether or not, since the death of Rachel R. Greene, any

contribution to the support of William has been made by the residuary devisees or from said residuary estate, or, if any, how much; nor does it appear (except by statements in argument) whether William has been kept and furnished with a home and with board and clothing by the residuary devisees, upon the real estate, or otherwise. Nor do we know whether the sum of \$10 per week which his guardian, Walter R. Greene, complainant, has applied for William's support and maintenance out of William's own individual estate, under the advice and order of the Probate Court of North Kingstown, has paid the entire cost of his support and maintenance; or whether it has been in addition to other support and maintenance furnished by the residuary devisees who are bound to support and maintain him under the terms of the will, as above shown. In *Bourne v. Hall*, 10 R. I. 139, where a bill in equity was filed by the administrator of a deceased person *non compos mentis*, for whose benefit a charge for support and maintenance had been imposed upon real estate by the will of the father of the deceased, seeking to establish a trust upon the owners of the estate and a reimbursement for moneys expended out of the individual estate of the deceased for his support, it was said (p. 152): "The defendant further contends that the provision of the will for the support of William was personal to himself and expired with him. We quite agree with the defendant that no one but William can claim to be supported under the will; but it appears that, by reason of the default of those chargeable with his support, his estate has been lessened, and the question is whether, to the extent to which it has been lessened, it ought not to be indemnified. The defendant says not. He says that after the death of the testator property came to the *non compos* by inheritance, and that it is not to be supposed that it was the intention of the testator that he should continue to have his support from Lucy and George Coggeshall after he had come into possession of property of his own. Doubtless the guardian of William, after he had become possessed of property of his own, would be justified in affording him a better support than before, and for the additional ex-

pense of such better support would be entitled to look only to the property of his ward; but we can discover no indications in the will that the testator did not intend his son should continue to participate in his bounty as he had previously been entitled to do in the event of his inheriting property from another source. On the contrary, the fact that the will provides that, if he should become of sound mind, he should have a third of the real estate devised to the other two sons, shows that he was an object of special testamentary care and regard. . . .

"The defendant urges that if the *non compos* continued entitled to support under the will, notwithstanding his own property subsequently inherited, and did not have such support, the fault was that of his guardians, who did not enforce it, and the plaintiffs can look only to them for indemnity. We do not take this view. It may have been the duty of the guardians to enforce the right of their ward under the will, as it would have been their duty to enforce the payment of a debt due to him, if any such there were; but, in our opinion, their neglect did not operate as a release of the duty of support in the one case, any more than it would as a release of the debt in the other. The duty imposed by the will was an active duty to care for a person incapable of caring for himself, and should have been voluntarily performed, without waiting for any request; and if, by reason of any neglect to perform it by those charged with the duty, the estate of the *non compos* has been reduced, we think his administrator is entitled to resort to the farm, upon which his support was charged, to have the estate, to the extent to which it was so reduced, made whole again. Beyond this, however, we do not think any claim of the plaintiffs can be allowed. . . .

"We think a decree should be entered sending the case to a master to take an account, not extending back, however, to any time anterior to the decease of Lucy Coggeshall."

In accordance with the above views, we think that the complainant, William Greene, is entitled to have, and recover from the defendant Rathbun, administrator, out of the personal estate

of Reynolds Greene, deceased, now in his hands, such an amount as shall be shown, upon reference to a master (or by agreement of parties), to have been necessarily and properly expended for his support out of his own individual estate in the hands of his guardian, so that his individual estate may be reimbursed for any depletion thereof, if any, caused by the failure of the residuary devisees to furnish him with support under the terms of the will.

- (6) Inasmuch as the fund in the hands of the respondent Rathbun, administrator, appears to be ample for such support of William Greene as may be required for the remainder of his life, we do not deem it necessary at present that a decree be entered directing sale of the real estate and application of the proceeds of sale; nor can we now, from anything appearing in the case, fix any certain and definite amount which should be decreed to be paid for such support either out of the fund in the hands of the administrator, or by the residuary devisees. The parties may be able to agree upon such sums as would be proper from time to time, or the case might, if the parties so desire, be referred to a master to ascertain and report what sum should be allowed and paid.

The parties may prepare and present a form of decree, in accordance with this opinion, stating the rights of the respective parties in and to the real and personal estate here in question, and charging the same with the support and maintenance of William Greene, under the provisions of the will, with provision for reference to a master in chancery (if desired, and unless the parties can agree) to ascertain what amount, if any, should be paid over by the administrator to the guardian, to reimburse the individual estate of William Greene, and what amount should be allowed for the future support of William Greene, and with leave to apply for further relief by decree, in case it becomes necessary in future to resort to the real estate for the future support and maintenance of said William Greene.

Gorman, Egan, and Gorman, for complainants.

Herbert A. Rice, Frederick C. Olney, Lyman and McDonnell, for various respondents.

JOSEPH MARTIN vs. THE RHODE ISLAND COMPANY.

JANUARY 13, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Street Railways. Automatic Fare Register. Reasonable Regulations.*

A rule of a street railway company requiring the payment of fare by its passengers by means of an automatic fare registering device held in the hand of the conductor, wherein the passenger inserts a nickel, is a reasonable regulation justifying the ejection of a passenger who, having notice of such regulation, fails to observe it, no undue force being used.

The ejection of a passenger, without undue force, is also justified under such regulation, where such passenger, having notice thereof, tenders five pennies in payment of fare, and refuses to receive in exchange therefor a nickel, and to insert said nickel into the automatic fare register, the passenger being notified when he tendered the pennies that they would be received by the conductor only for the purpose of providing the passenger with a nickel; it being closely analogous to the regulation requiring the purchase of a ticket by a passenger.

(2) *Reasonableness of Rule Question for Court.*

The question of the reasonableness or unreasonableness of a regulation made by a carrier for its protection in the collection of its lawful charges, is one to be determined by the court, and is not to be submitted to the jury.

(3) *Legal Tender. Reasonable Regulations.*

Semble: The refusal to take the five separate cent pieces under the above conditions is not a violation of the legal tender statute (vol. 2, U. S. Comp. Stat. 1901, § 3587), which provides that "the minor coins of the United States shall be a legal tender at their nominal value for any amount not exceeding twenty-five cents in any one payment," and the regulation as applied to such facts is not unreasonable as a violation of such statutory right.

(4) *Maximum Fare. Mode of Payment.*

The establishment by law of a maximum rate of fare does not abrogate the power of the carrier to make reasonable regulations as to the mode of payment.

TRESPASS ON THE CASE. Certified to the Supreme Court, under Gen. Laws, cap. 298, § 5.

PARKHURST, J. This case comes before the court for hearing upon questions of law of such doubt and importance and so affecting the merits of the case that, in the opinion of the Superior Court, they should be determined by the Supreme Court before further proceedings, and are certified in accordance with the provisions of chapter 298, section 5, of the General Laws of Rhode Island, 1909.

The action is trespass on the case, brought by Joseph Martin against The Rhode Island Company, for damages resulting from

being ejected from the defendant's cars. The declaration is in four counts.

The first count sets out in general terms that the plaintiff boarded the defendant's car and tendered the conductor in charge of the car a nickel in payment of his fare; that the conductor declined to accept said nickel, stopped the car, and wrongfully ejected the plaintiff therefrom.

The second count covers the same ejectment, but sets out with greater detail that the plaintiff boarded a certain car belonging to the defendant, and tendered the conductor in charge of the car a nickel in payment of his fare; that the conductor requested the plaintiff to insert said nickel into an automatic fare-registering device held in the conductor's hand; that the plaintiff declined to accede to the request of the conductor, whereupon the conductor stopped the car and wrongfully ejected the plaintiff therefrom.

The third count covers an ejectment on a different day, and sets out in general terms that the plaintiff boarded the defendant's car and tendered the conductor in charge of the car five pennies, in payment of his fare; that the conductor declined to accept said five pennies, stopped the car and wrongfully ejected the plaintiff therefrom.

The fourth count covers the same ejectment as the third, but sets out in detail that the plaintiff boarded a certain car belonging to the defendant and tendered the conductor in charge of the car five pennies, in payment of his fare; that the conductor took said pennies, tendered a nickel to the plaintiff and requested him to insert said nickel into an automatic fare-registering device held in the conductor's hand; that the plaintiff declined to accept said nickel and insert it into the automatic fare-registering device, whereupon the conductor stopped the car and wrongfully ejected the plaintiff therefrom.

The defendant filed a plea of the general issue to each of the four counts of the declaration, and a special plea to each of the four counts. The special pleas to the first and second counts of the declaration are practically identical, and set up in substance that when the plaintiff entered the defendant's car he

failed to comply with the reasonable regulations of the defendant, known to the plaintiff, governing the manner of the payment of fares, and refused to insert his nickel into the automatic collector held in the hand of the conductor, although requested to do so by the conductor; that said plaintiff was informed by the conductor that in accordance with the regulations of the defendant he would have to insert his nickel into said automatic collector, or he would have to leave the car; that upon the continued refusal of the plaintiff to insert his nickel into the automatic collector, the car was stopped and the plaintiff ejected, using no more force than was necessary.

The special pleas to the third and fourth counts of the declaration are practically identical, and set up in substance that when the plaintiff entered the defendant's car and tendered to the conductor five pennies in payment of his fare, the conductor received said pennies for the sole purpose of providing the plaintiff with a nickel which the plaintiff might insert into the automatic collector, in accordance with the reasonable regulations of the defendant; that the conductor informed said plaintiff of the purpose for which said pennies were received, and tendered him a nickel and requested him to insert it into the automatic collector held in the hand of the conductor, in accordance with the regulations of the defendant; that the plaintiff refused to accept said nickel and insert it into the said automatic collector; that thereupon the conductor informed the plaintiff that he must either receive said nickel and insert it into said automatic collector, in accordance with the defendant's regulations, or leave the car; that upon the continued refusal of the plaintiff to accept said nickel and insert it into said automatic collector, the car was stopped and the plaintiff ejected, using no more force than was necessary.

The plaintiff demurred to each of the special pleas upon the following grounds:

1. That said pleas contain no allegations which constitute a defence to this action.
2. That while said pleas purport to be pleas in confession and avoidance, said pleas confess the commission of the griev-

ances complained of but do not set forth sufficient matter in justification.

3. That the regulations of said defendant set forth in said pleas are not reasonable regulations and therefore not a justification of the defendant's conduct complained of in the plaintiff's declaration.

The questions of law certified by the Superior Court to be determined by the Supreme Court are as follows:

- (1) 1. Is a rule of a street railway company requiring the payment of fare by its passengers by means of an automatic fare-registering device, held in the hand of the conductor, consisting of a small nickel-plated box having a coin-slot on one side through which the passenger inserts a nickel, a reasonable rule or regulation, justifying the ejectment of a passenger by the conductor in charge of the car should the passenger, having notice of such rule or regulation, fail to observe said rule, no undue force being used?

2. Is a rule of a street railway company requiring the payment of fare by its passengers by means of an automatic fare-registering device, held in the hand of the conductor, consisting of a small nickel-plated box having a coin-slot on one side, through which the passenger inserts a nickel, a reasonable rule or regulation, justifying the ejectment of a passenger by the conductor in charge of the car, no undue force being used, who, having notice of such rule or regulation, tenders five pennies in payment of his fare, and who refuses to receive in exchange therefor a nickel, and to insert said nickel into the automatic fare-registering device, the passenger being notified at the time said pennies are tendered that they will be received by the conductor only for the purpose of providing said passenger with a nickel?

We understand the word "nickel," used in the first question, to mean the five-cent piece now and long since in common use in the United States, made partly of nickel, and colloquially called a "nickel;" and the word "pennies," used in the second question, to mean the single separate one-cent pieces now in common use; strictly speaking, we know of no coin now in use

in the United States which is properly called a "penny" (See vol. 2, U. S. Comp. Stat. § 3515).

The incidental power of a common carrier to establish reasonable rules regulating the time, place, and mode for payment of its reasonable charges is unquestioned on the plaintiff's brief, and is amply sustained by the authorities. 28 Am. & Eng. Enc. of Law, 166; *Reese v. Pennsylvania R. R.* 131 Pa. St. 422 (1890), 19 N. E. 72. 1 Elliott, Railroads, vol. 1, § 199: "A railroad company has an implied authority (which is necessarily almost absolute) to make and enforce all reasonable rules and regulations for the control of its trains and the persons thereon, of persons using its stations and grounds, and of those transacting business with it, in order to provide for the safety of its passengers and employees, and to protect itself from imposition and wrong."

The power to make such regulations is essential to the maintenance of the undoubted right of the carrier to secure to itself, in return for services rendered, the compensation prescribed by law, and is in aid of a right as absolute in the carrier as is the right of the passenger himself to demand transportation. And the courts have repeatedly held that regulations of this character may, and should be, sustained upon the sole ground that they or similar rules are reasonably necessary to protect the carrier in the collection of his lawful charges, even though the rule manifestly results in additional hardship to the passenger but not interfering with his primary right to transportation. Thus in the leading case of *Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 455 (1857), it was held that a railroad company had a right to compel passengers to exhibit their tickets to the conductor as often as requested, because (p. 458) "this or some similar arrangement is absolutely necessary for the company, unless they are willing to transport passengers free." And see other cases cited *infra*.

- (2) It is also well settled and not disputed by either party that the question of the reasonableness or unreasonableness of such a rule is one to be determined by the court, and is not to be submitted to the jury. See *Vedder v. Fellows*, 20 N. Y. 126;

Ill. Central R. R. Co. v. Whittemore, 43 Ill. 420; *Wolsey v. Lake Shore & M. S. R. R. Co.*, 33 Ohio St. 227; *Hoffbauer v. The D. & N. W. R. Co.*, 52 Ia. 342; *Louisville & Nashville R. R. Co. v. Fleming*, 18 Am. & Eng. R. R. Cas. 347; *Ry. Co. v Hardy*, 55 Ark. 134; *Central of Ga. Ry. Co., v. Motes*, 117 Ga. 923; *Burge v. Ga. Ry. & Electric Co.*, 56 Am. & Eng. R. R. Cas. (N. S.) 223, and other cases, *infra*; 1 Elliott on Railroads, § 202; 1 Thompson on Trials, § 1057.

The plaintiff, in argument, contends that the rules set up by the defendant are unreasonable, because they cause great inconvenience and annoyance to passengers without benefit to the traveling public; because they are solely for the benefit of the defendant, in keeping a check upon dishonest conductors (admitting however, that the device is effective for such purpose); because they are a reflection upon the honesty of every conductor in the defendant's employ, and do not serve the convenience of the conductor in keeping account of the fares collected; and because the adoption of the fare-registering device in question is unnecessary even to protect the defendant from dishonest conductors, suggesting that the defendant, like all carriers of passengers, has a right to demand that passengers procure tickets before entering the cars, and that a rule requiring the presentation of a ticket by the passenger would be a proper and effective check upon the dishonesty of conductors.

We are of the opinion that none of the objections urged by the plaintiff, as against the reasonableness of the rules in question, are tenable.

The plaintiff cites no authorities even tending to show that the rules here in question are unreasonable; he cites only the case of *Kennedy v. Birmingham Railway, Light & Power Co.*, 138 Ala. 225, 230, in which one question only was presented, viz.: "The reasonableness of a regulation of the defendant company requiring the plaintiff as a passenger to pay in cash a greater sum than is charged by it for a ticket between the same points." . . . The plaintiff had no ticket, and there was no ticket office where he could buy a ticket conveniently; and so it was held as to him, that the enforcement of the rule was unreason-

able, and that the rule furnished no defence to his ejection from the car. The court says, p. 230: "All the cases agree that carriers of passengers may require persons to purchase tickets before taking passage on their cars, and to this end may adopt a rule or regulation establishing a higher rate to be paid to the conductor than the rate charged for a ticket. But to justify a discrimination in the rates, the carrier must provide the proper facility and accommodation for so purchasing the ticket. If the carrier fails to give the passenger a convenient and accessible place and an opportunity to buy his ticket before entering the car, the regulation is unreasonable and void and is no defense to an action brought by the passenger for his ejection by the conductor after he has paid the ticket rate." (Citing and discussing a number of cases.) And the plaintiff also cites 2 Hutchinson on Carriers, section 1032, where the right of carriers of passengers to make reasonable rules requiring the purchase and exhibition of tickets is discussed, and upheld.

It being conceded by the plaintiff, and being in accordance with his own citations of authority, as well as with the numerous other cases herein cited, that it is well settled to be a reasonable rule that a carrier of passengers may require the passenger to purchase a ticket before entering the cars, and to present the same to the conductor upon request, provided the carrier furnishes proper facility and accommodation for the passenger to purchase such ticket, we think the portion of the rule here under consideration, requiring the passenger to present a nickel (five-cent piece) to the conductor in payment of his fare, is quite closely analogous to the ticket requirement, and imposes no greater burden upon the passenger than the rule requiring the purchase of a ticket; in fact, the burden upon the passenger is much less under the nickel (five-cent-piece) rule here in question, than under the ticket rule, inasmuch as under the ticket rule, as generally applied, the passenger must purchase his ticket at one or more specified stations of the carrier, and is not allowed to purchase it of the conductor; while, under the nickel rule here in question, every conductor becomes a ticket agent and every car a station; where the

equivalent of the ticket may be purchased. So that, in our opinion, that portion of the rule which requires the passenger to present a nickel to the conductor, and to purchase one of the conductor, if the passenger has none, is a simplification of the ticket rule, in favor of the passenger, and favors the passenger to that extent, and is entirely reasonable.

The only portion of the rule that remains to be discussed, then, is the requirement that the passenger's nickel, either the one which he originally had or the one which he has purchased of the conductor, shall be inserted by the passenger in the fare-registering box held in the conductor's hand, instead of in the hand of the conductor itself. The device in use by the defendant corporation is called the Rooke Automatic Register, one of which was exhibited to the court, and its workings explained, at the argument of this case. It consists of a small nickel-plated box, of convenient size to be held in the hand, of neat appearance, with a coin-slot conveniently placed; and the manner of paying fares required by the defendant's rule involves simply the partial insertion, by the passenger, of a nickel into the slot. As soon as the edge of the nickel touches certain fingers or levers within the slot, the coin is automatically drawn in by the mechanism, and at the same time the fare is registered, and the operation is complete. This involves no more labor or delay or trouble on the part of the passenger than the act of placing the coin in the conductor's hand, and the automatic grasp of the coin by the machine is positive and certain; whatever of delay or trouble may be involved in the obedience to the rule comes from the necessity of making change in case the passenger is not provided with a nickel and is obliged to obtain one from the conductor; and this, as we have already seen, is so far analogous to the principle of the rule regarding the purchase of tickets that we regard the settled law of the cases heretofore cited as amply supporting the principle contended for by the defendant in this case.

It is quite obvious that the rules in question in this case are far less burdensome to the passenger than many rules regarding the manner of payment of fares, purchase, and showing

of tickets, taking transfers, making change, and other matters incident to the passenger's right to carriage, which have been held to be reasonable by courts of undoubted authority. (See cases cited *supra*.) See also *Burge v. Georgia Ry. & El. Co.* 56 Am. & Eng. R. R. Cas. (N. S.) 223; *Knoxville Traction Co. v. Wilkenson*, 45 Am. & Eng. R. R. Cas. (N. S.) 763; *Funderburg v. Augusta & Aiken Ry. Co.* 53 Am. & Eng. R. R. Cas. (N. S.) 281; *Yorton v. M., L. S. & W. Ry. Co.* 6 Am. & Eng. R. R. Cas. 322; *Birmingham Ry. L. & P. Co. v. Yielding*, 53 Am. & Eng. R. R. Cas. (N. S.) 285; *Same v. McDonough*, 44 So. Rep. 960; *Montgomery v. Buffalo Ry. Co.*, 165 N. Y. 139; *Nye v. Marysville & c. St. Ry. Co.* 97 Cal. 461; *Ketchum v. N. Y. City Ry.* 118 App. Div. 248; *Sickles v. Brooklyn Heights Rd. Co.*, 113 App. Div. N. Y. 680, 99 N. Y. Supp. 953; *Percy v. St. Ry. Co.*, 58 Mo. App. 75; *Faber v. C. G. W. Ry. Co.*, 62 Minn. 433.

None of these rules, sustained above as reasonable, contributed to the convenience of the passenger. All of them required affirmative action or restraint, involving some inconvenience on his part, and they were sustained on the ground that a carrier should be allowed to adopt rules which tend reasonably to insure to it the return allowed by law for services rendered. The difficulties incident to the collection of the moneys due the defendant are apparent to any observer, and are admitted by the plaintiff in his brief. Thousands of employees, on comparatively small salaries, must, from the nature of the conditions surrounding the street car business, be entrusted with the collection, from thousands of passengers, during the day's run, of sums exceedingly small in amount in each transaction, but large in the aggregate. Assuming that 100,000,000 nickels are paid, during the course of a year, by passengers, to the agents of the defendant company, it is clear that an automatic registering device of the character here under consideration, which imposes only slight (if any) inconvenience upon the passenger, and which is of such manifest aid both to the company and to its conductors in simplifying the accounting for and return of fares collected, securing accuracy, and tending to prevent fraud and mistake, should be approved

rather than condemned. The plaintiff shows, at the most, nothing but that slight degree of annoyance incident to the enforcement of these rules; which will generally be found to exist on the part of a certain few passengers, who are always likely to manifest impatience with the use of new devices, even when they are of obvious utility. But there are, in our opinion, several cases of such close analogy to the case at bar, involving a consideration of devices so nearly like that here in use, as related to the question of the convenience of the passenger, as well as to that of the advantage to the company and its conductors, that they are to be regarded as quite conclusive, upon many of the objections urged by the plaintiff.

In the case of *Kitchen v. Saginaw Circuit Judge* (See 117 Mich. 254), an unreported case in the Circuit Court for the county of Saginaw, in chancery, one Morris C. L. Kitchen filed an application for leave to bring an action at law against the receivers of the Union Railway Company, setting forth the facts that plaintiff boarded a car of the Union Street Railway Company, took his seat, "and when approached by the conductor tendered to him five cents in payment of his fare, but the conductor refused to receive the same and requested the petitioner to drop the same in a small metal box which he held in his hand. This he (the petitioner) declined to do. Whereupon the conductor advised him that a rule had been made for the government of the road, by the receivers, requiring passengers to put fare in boxes carried by the conductors." Upon a second refusal, petitioner was ejected without undue force. And the Circuit Court held that the rules prescribed by the receivers "are reasonable; that they do not impose any additional burdens or hardships upon the passengers. . . . and that the petition is, therefore, denied." This decree was sustained by the Michigan Supreme Court on April 19, 1898, and subsequently approved in the reported case of *Morley et al. v. Saginaw Circuit Judge*, 117 Mich. 246, 254. It is worthy of note that this box was also an automatic register, and the circuit judge comments on its advantages, both to the company and the conductors, in that "By the new system (cash

register box in the hand as compared with the old registering system of ringing up fares by the conductor) there can be no shortage to be made up by the conductors, or losses to be borne by the company. The box properly registers every fare and all the money and tickets received are in the box and there is no chance for mistake or fraud and no settlements are required at the end of the day with the conductors."

In *Morley v. Saginaw Circuit Judge*, 117 Mich. 246 (1898) (*supra*), the reasonableness of a regulation requiring payment into a cash register, rather than into the conductor's hand, is sustained; and in an able opinion, which we think completely answers the objection that the use of a cash register reflects on the honesty of conductors as a class, the court says (p. 249): "Conductors of street cars deal with a great number of persons, some of whom are entering and leaving the cars frequently. It often happens that change must be made, and there are opportunities for mistakes. It is not unreasonable to assume that, like persons in all callings, some of the employees of street-car companies will yield to temptation, when presented. Every one at all familiar with business upon a large scale knows that it is desirable to have it systematized that mistakes or fraud in its conduct shall not occur. Officials, both of the state and nation, and officers charged with the management of banks, railroads, and other corporations are surrounded by checks and safeguards calculated to do away with the possibilities of frauds or mistakes. The cash register is to be found in most places of business. Upon the elevated roads in the large cities, the passenger pays his fare before he enters upon the platform, over which he must pass to get admission to his train. Every one recognizes the checks and safeguards, as proper to be used, and no one has a right to regard them as an imputation upon the honesty of any individual using them. Their use is simply a recognition of what we all know to be a fact, with humanity constituted as it is,—that, in the conduct of a large business by many persons, there is a liability to make mistakes, and a possibility of the commission of frauds. The Great Teacher, in that prayer which is the model of all prayers,

prayed, 'Lead us not into temptation, but deliver us from evil.' It can readily be seen how the unintelligent or dishonest might object to these checks and safeguards, but it is difficult to understand how the honest and intelligent should object to any practical method which would reduce the probability of mistakes, or the opportunities for the commission of fraud, to the minimum."

In *Elder v. International Railway Company*, 122 N. Y. Supp. 880, Mr. Justice Wheeler, on May 3, 1910, held that a rule forbidding conductors to take fare from passengers, and requiring the passenger, himself, to deposit his fare in a box at the door on a pay-as-you-enter car, was a perfectly valid and reasonable regulation.

In *Nye v. Marysville, etc., St. Ry. Co.*, 97 Cal. 461 (1893), it was held that a rule requiring a passenger on a street car to deposit his fare in a box on entering the car was "reasonable and necessary to prevent fraud upon the company," non-compliance with which would justify ejection.

In *Curtis v. Louisville City Ry. Co.*, 94 Ky. 573 (1893), 21 L. R. A. 649, the court said (p. 576): "By the rules of the appellee, a passenger that gets on a street car must deposit his fare in the box within one block. The driver must not receive the fare, etc. . . . These rules are reasonable, and the appellant was aware of them."

In *Commonwealth v. McGinn*, 29 Leg. Int. 124 (1872), a case at *nisi prius*, the court charged the jury that a rule requiring payment into a box, and not to the driver, was a reasonable regulation, and says that the passenger, by his contract, obligates himself not only to pay the established fare, but to observe the reasonable regulations made by the defendant, among which "the mode and time of payment were of the first importance."

At the argument of this cause the question was raised, whether the rules in question were in anywise in conflict with the legal tender statutes of the United States. No such question is raised by the pleadings in the case, nor suggested in the questions certified for our determination. But as the parties

have argued the question upon our own suggestion, we will proceed to consider it.

- (3) Vol. 2, U. S. Comp. Stat. 1901, § 3587 (1873), provides that "the minor coins of the United States shall be a legal tender, at their nominal value for any amount not exceeding twenty-five cents in any one payment." This statute undoubtedly makes the tender of five separate cent pieces legal tender for a debt of five cents. The question therefore arises, whether the refusal to take the five separate cent pieces, under the conditions described in the second question certified, violates the legal tender statute quoted above, and whether the regulation, as applied to the facts therein set forth, is unreasonable as a violation of a statutory right given the plaintiff by the laws of the United States. This objection is not levied at that part of the rule requiring a passenger to put *money* into a box in payment of fare, but to the fact that only one kind of a coin can be so placed by him, namely, a nickel, and that the tender of five separate cent pieces, the exact equivalent under the statute quoted above, is refused except on the condition that the passenger exchange them for a nickel supplied by the conductor.

Upon careful consideration of this question, and in view of our finding, above set forth, that the rule requiring the presentation of a nickel by the passenger, in payment of his fare, is so closely analogous to the ticket-rule (which has been so frequently upheld) as to be reasonable and valid upon similar grounds; and further, in view of the fact that the conductor does not refuse the five separate cents on the ground that their purchasing power is not equivalent to a nickel, and not sufficient for full payment of a fare, but, on the contrary, is willing to and does in fact accept them and tenders a nickel in exchange therefor, we are satisfied that there is no such refusal to accept the money in payment of a fare, on the part of the conductor, as constitutes a violation of the legal tender statutes. If the plaintiff offered the five separate cent pieces; and received a ticket, and was required to insert the ticket into the register, no one would contend that the legal tender statute was violated. The transaction, as set forth in the plaintiff's declaration, however,

is, in our view of it, essentially the same, with the exception that a nickel is given in exchange for the five separate cent pieces rather than a ticket. We hold, therefore, that the regulation adopted by the defendant is not a violation of the legal tender statute quoted above, and is not, because of that statute, to be deemed unreasonable.

- (4) It was also urged, in the oral argument, that a passenger has, under the charter of the defendant company, and under the transfer act, a right to demand transportation for five cents and no more, and that the requirement that he pay his fare into a box is in effect demanding a greater amount of fare from him than is permitted by law. The fallacy in this position lies in assuming that the establishment of a maximum amount of fare abrogates the power of the carrier to make reasonable regulations. The establishment by law of a maximum rate of fare has never been construed as requiring transportation by the carrier of every passenger presenting the requisite fare unless he also conforms to the reasonable regulations established by the carrier; otherwise, in the absence of express statutory authority, the carrier would be powerless to eject intoxicated or other unfit persons, or to make any of the numerous rules which it is under duty to make for the safety of the passenger and the expediting of its business.

In *Reese v. Pa. R. R. Co.*, 131 Pa. St. 422, the contention stated above was squarely raised, and the question decided in favor of the carrier's power to make regulations as to mode of payment in spite of a maximum rate limit in the charter. There the defendant adopted a train charge in excess of the ticket charge, and also in excess of the maximum rate per mile allowed by its charter, the excess over ticket fare being refunded on the presentation of a rebate slip at defendant's ticket office at the end of the journey. And it was held that the carrier had a right "to make reasonable regulations, not only as to the amounts of fares, but as to time, place, and mode of payment;" and that the charter provision was a restriction "of the *amount* of collection, not of the *mode* of collection; the

protection of the traveler from excessive demands, not interference with the time, place, or mode of payment."

In *Percy v. St. Ry. Co.*, 58 Mo. App. 75, it was held that a charter provision requiring that the defendant company give a continuous trip on parallel lines for one fare, did not forbid a regulation requiring the passenger to ask for a transfer designating the particular place from which he wished to board the second car.

In *Crandall v. International Ry. Co.*, 117 N. Y. Supp. 1055, it was held that the defendant company might require a passenger not only to obtain a transfer, but to demand it at the time he paid his fare, and to give the destination line when asking for a transfer; although the company was compelled by law to carry a passenger on a continuous trip between any two points on its road by the most direct route for no more than a single fare.

In all of these cases something more was demanded of the passenger than the single act of payment, although in each case the full amount legally demandable had been given. The fixing of the amount of fare, therefore, in no way prevents the adoption of the mode of payment contended for in this case.

The plaintiff has wholly failed to show that the rules in question are in anywise so burdensome or inconvenient to the passenger that they should be deemed to be unreasonable. He admits the necessity of some regulation, as to the method of payment and collection of fares, to enable the defendant to receive its lawful compensation and to prevent fraud and mistake. The regulation in use tends to secure the end desired.

We are therefore of the opinion, that, both upon principle and upon authority, the rules set forth in the two questions submitted to this court for its determination are reasonable, and we answer both of said questions in the affirmative.

C. M. Van Slyck, Frederick A. Jones, for plaintiff.

Joseph C. Sweeney, Clifford Whipple, for defendant.

Edwards and Angell, for Rooke Automatic Register Co.

Frank H. Swan, Francis B. Keeney, of counsel.

ELIZABETH F. MOHR vs. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

JANUARY 16, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Life Insurance. Conditions Precedent. Burden of Proof. Evidence.*

A policy of insurance contained the clause "This policy shall be incontestable after one year from its date if all due premiums shall have been paid." The application was signed by the insured and contained the provision that "said policy shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full while my health is in the same condition as described in this application." In the application the insured warranted that he was in good health:—

Held, that the existence of good health in the insured at the time of the delivery of the policy is a condition precedent to the obligation of the company, and at a trial of an action upon the policy the company can insist that such good health at the time of the receipt of the first premium and delivery of the policy shall appear by a preponderance of the testimony before its liability attaches, unless this condition has been clearly waived by the company, or its right to raise this defence is restricted by some other provision of the policy.

Held, further, that it was not error to permit plaintiff to introduce the policies in evidence without first requiring specific testimony of good health at the time of their delivery, since the receipt of the premium and delivery of the policy raised the presumption of good health at that time. This presumption might be rebutted by the defendant, the *prima facie* case made by such presumption not shifting the burden to the defendant but merely lifting it.

(2) *Life Insurance. Evidence. Incontestable Clause.*

Held, further, that, but for the "incontestable clause," the defendant would have been entitled to introduce testimony as to the health of insured at the time of delivery of the policy, and plaintiff could not recover unless the good health of insured at that time had been established by a preponderance of the testimony. But, more than a year having elapsed between the date of policy and death of insured, testimony of physicians offered by defendant as to health of insured at delivery of policy was properly excluded.

(3) *Insurable Interest.*

Testimony in an action upon a policy of life insurance was offered to show that insured, 17 years of age, was nephew of beneficiary; that he had come to live in her family; that she and her husband had undertaken to care for and educate him; that he was pursuing his studies at their home under the instruction of her husband; that he had lived with them two months

when the policy was issued, and continued to live with them for a number of months thereafter:—

Held, that such testimony would entitle the jury to find that beneficiary had an insurable interest in the life of insured.

(4) *Verdicts.*

Where a jury was instructed that to find for plaintiff they should be satisfied that a policy of insurance was actually the contract of insured or that the beneficiary had an insurable interest in the life of insured, a general verdict for plaintiff (beneficiary) must be regarded as a finding of one or the other of such facts.

ASSUMPSIT on insurance policies. Heard on exceptions of defendant, and overruled.

SWEETLAND, J. This is an action of the case in assumpsit, brought by the plaintiff as the beneficiary named in two policies of insurance issued by the defendant upon the life of one Joseph P. Hennon. One of said policies is for the sum of five hundred dollars, and is dated January 28th, 1907; the other is for the sum of five thousand dollars and is dated February 7th, 1907. By its terms each of said policies is payable to "the insured if living twenty years after the date hereof, or, in case of the prior death of the Insured, to Elizabeth F. Mohr, Beneficiary, Aunt of the Insured, if the Beneficiary survive the Insured, otherwise to the executors, administrators or assigns of the Insured." Each of said policies contains the following clause: "This policy shall be incontestable after one year from its date if all due premiums shall have been paid."

The application for each policy was signed by said Joseph P. Hennon, and contained the provision that "said policy shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full, while my health is in the same condition as described in this application." In each of said applications the said Joseph P. Hennon warranted that he was in good health. The insured died on June 3rd, 1908. The insurance company refused to pay the amount of said policies to this plaintiff, the beneficiary named therein. The case was tried in the Superior Court, before Mr. Justice Brown and a jury, and verdict was

rendered for the plaintiff for the full amount of both policies. A motion for a new trial was denied in the Superior Court.

The case is here upon exceptions to certain rulings made at the trial in the Superior Court by the justice presiding; and to the refusal of said justice to grant a new trial.

The defendant excepted to the ruling of the justice presiding permitting the plaintiff to introduce in evidence the two policies of insurance in question, without first offering testimony that the insured was in as good health at the time of the delivery of the policies as he was at the time he made his application for said policies.

This exception raises the question as to the construction which shall be given to the agreement of the insured, contained in the application for the policies of insurance, signed by him and made a condition of the policies, viz.: that the policy should not take effect until the same was issued and delivered by the company, and the first premium thereon paid in full, while the insured was in good health as described in the application.

Similar provisions in insurance policies have frequently been before the courts for construction, and different courts have reached somewhat different conclusions as to the effect of such provisions. In *Connecticut Indemnity Ass'n. v. Grogan*, 52 S. W. 959, the court said: "An agent who has authority to take applications for insurance and power to collect the premiums and remit the same to the company, as was done in this case, clearly has the power to determine as to whether the insured is entitled to receive the policy, and to waive any question as to sound health." And see also *Northwestern Life Ass'n v. Findley*, 68 S. W. 695; *Quinn v. Metropolitan Life Ins. Co.*, 41 N. Y. Suppl. 1060.

In *Grier v. Life Ins. Co.*, 132 N. C. 542, it was held: "The provision in the application that the contract shall not take effect until the first premiums shall have been paid, during the applicant's continuance in good health, is only a provisional agreement authorizing the company to withhold the delivery of the policy until such payment in good health; but when

the company actually delivers the policy, then it is estopped, in the absence always of fraud, to assert that its solemn contract is void either on account of non-payment of premium or of ill health, which stipulations were asserted in the application as conditions to excuse it from such delivery, and are not grounds to invalidate the policy after it has been delivered."

- (1) In our opinion, a sounder construction is that the existence of good health in the insured at the time of the delivery of the policy is a condition precedent to the obligation of the insurance company. And that at a trial of an action upon the policy the insurance company can insist that the good health of the insured, at the time of the receipt of the first premium and the delivery of the policy, shall appear by a preponderance of the testimony before its liability attaches, unless this condition precedent has been clearly waived by the company or its right to raise this defence is restricted by some other provision of the policy. *Gallant v. Metropolitan Life Ins. Co.*, 167 Mass. 79; and *Packard v. Ins. Co.* 72 N. H. 1; *Langstaff v. Ins. Co.*, 69 N. J. L. 54; *Barker v. Metropolitan Life Ins. Co.*, 188 Mass. 542.

It was not error, however, to permit the plaintiff to introduce the policies in evidence without first requiring her to present specific testimony of the good health of the insured at the time of their delivery.

To regulate the order of proof is largely within the discretion of the court. Moreover, testimony of the receipt of the first premium and of the delivery of the policy by the defendant to the insured raises the presumption that the insured was in good health at the time of such delivery. This presumption may be rebutted by the defendant. The burden remains upon the plaintiff to establish this fact made a condition of the policy. The *prima facie* case in favor of the plaintiff made by this presumption does not shift the burden to the defendant, but, as was held by this court in *Sweeney v. Met. Life Ins. Co.*, 19 R. I. 171, by this presumption the burden is lifted.

- (2) The defendant excepted to the ruling of the justice presiding excluding the testimony of certain physicians as to the condition of health of the insured at about the time of the

delivery of the policies to him. The defendant sought to introduce this testimony for the purpose of showing that the health of the insured was not good at the time of said delivery. The defendant also excepted to the refusal of the justice presiding, at the conclusion of the testimony, to direct a verdict in favor of defendant on the ground that the testimony did not show the insured to have been in good health at the time of delivery of the policy to him. The defendant also excepted to the refusal of the justice to grant it a new trial upon the same ground. These exceptions may well be considered together. But for the presence in said policy of the so-called incontestable clause, quoted above, the defendant would be entitled to introduce testimony as to the condition of health of the insured at the time of the delivery of the policy; and the plaintiff would not be allowed to recover, unless the good health of the insured at the time of such delivery had been established by a preponderance of the testimony.

The defendant does not dispute that a period of more than one year had elapsed between the date of the policies and the death of the insured. The defendant contends, however, that the policies must have had a legal inception in order to sustain an action thereon, and that, before the plaintiff could claim the benefit of the incontestable clause, she must show that all the conditions precedent to the issuance of the policies have been complied with. To this contention it should be said that the policies were issued and were delivered; that the premiums due upon said policies were received by the defendant up to the time of the death of the insured; that the policies were treated by the insured and the defendant as subsisting contracts between them. The policies upon their face purport an obligation on the part of the defendant. To an action to enforce this apparent obligation the defendant interposes the defence that the insured was not in good health at the time of the delivery of the policies. Upon this ground the defendant is contesting its liability under the policy. Such a contest is within the scope of that clause, which makes the policy incontestable after one year from its date if all due

premiums shall have been paid, without by its terms excluding any ground of defence. To hold otherwise would be to permit such a clause, in its unqualified form, to remain in a policy as a deceptive inducement to the insured. *Mutual etc., Ass'n. v. Austin*, 142 Fed. 398. These exceptions are overruled.

The defendant excepted to the refusal of the justice presiding to permit answers to a large number of questions which were asked of the husband of the plaintiff by the defendant's counsel in cross-examination. This ruling was not error. These questions were not properly in cross-examination of any matter as to which the witness had testified in direct examination. The justice told the defendant's counsel that he might ask these questions in direct examination of the witness if the witness was called by the defence. Moreover, most of the matters to which these questions relate were testified to by witnesses for the defendant, and their testimony was not rebutted by the plaintiff.

- (3) The defendant excepted to the refusal of the justice presiding to direct a verdict for the defendant upon the ground that the proof disclosed that the policies in question were gambling or wager contracts, and that the beneficiary did not have a *bona fide* insurable interest in the life of the insured. The defendant also excepted to the refusal of the justice to grant it a new trial upon the same ground. Testimony was given at the trial, which, if believed, would entitle the jury to find that the beneficiary had an insurable interest in the life of the insured. Joseph P. Hennon was the nephew of the beneficiary. He was seventeen years old at the time the policies in question were issued. The beneficiary and her husband each testified, that the insured had come to live in their family; that they had undertaken to care for him and to educate him; that he was pursuing his studies at their home under the instruction of the beneficiary's husband, who is a practicing physician. He had lived with them for two months at the time the policies were issued, and continued to live with them for a number of months thereafter. There is nothing in the testimony to indicate, that, if the insured had lived, they would not have continued

to care for and educate him. The justice presiding very carefully instructed the jury as to the nature of an insurable interest, in the circumstances of this case, in accordance with the decisions of this court; and charged the jury that, unless they found the policies of insurance to have been the *bona fide* contracts of the insured himself, the beneficiary should not be allowed to recover without satisfying the jury that she had such an insurable interest. *Cronin v. Vermont Life Ins. Co.*, 20 R. I. 570, was a case brought upon an insurance policy by the beneficiary named in the policy which was issued upon the life of the beneficiary's niece. The court said: "The important facts are that the niece lived with the aunt from early childhood at different times, amounting to years; that their relations were as those of mother and daughter; that the plaintiff supported her niece, the insured, and that a debt, both of affection and of money, was due to the plaintiff, for which she expected and had a right to expect return from the insured. Does this not set out an insurable interest? We do not understand the word "debt," as here used, to mean a debt recoverable at law, but a moral obligation from which the plaintiff had the right to expect care and kindness from the niece, in case of need. Taken in this view we think it shows an insurable interest, under the principles above laid down."

- (4) The defendant's exceptions do not present the question of whether or not, after the lapse of one year from the delivery of these policies, if all due premiums had been paid, the so-called incontestable clauses contained in the policies would prevent the defence of a lack of insurable interest in the beneficiary. The justice presiding permitted this defence to be made, and instructed the jury that, to find a verdict for the plaintiff they should be satisfied, either that these policies were actually the contracts of the insured, and not of this plaintiff, or of her husband, or that the beneficiary had an insurable interest in the life of the insured. The jury were not directed to make special findings upon these points. After this instruction of the justice, the jury's verdict must be regarded either as a finding that these policies were the contracts

of Joseph P. Hennon or as a finding that this plaintiff had an insurable interest in his life. The refusal of the justice to direct a verdict for the defendant, or to grant its motion for a new trial on the ground that the proof disclosed that the policies were wagering contracts, and that the beneficiary did not have an insurable interest in the life insured, was not error. These exceptions are overruled.

The defendant excepted to the instruction given to the jury, at the plaintiff's request, by the justice presiding, as follows: "If the deceased, Joseph P. Hennon, being of sound mind and acting on good faith, signed the applications submitted in evidence, and if thereafter the defendant delivered to him the policies submitted in evidence, then the plaintiff is entitled to recover in this action, if she is the beneficiary named in said policies, and if the said Joseph P. Hennon died more than one year after the delivery of said policies, when all premiums due under said policies had been paid." We find no error in this instruction. The justice had already charged the jury to the same effect, and had at length explained to the jury what he intended by the expression "acting in good faith." In one portion of the charge the justice said: "If the insured, acting in good faith, procures the policies, he may make them payable to any one without regard to insurable interest, and such beneficiary may sue on the policy and recover without proof of insurable interest. If, however, the policy is not procured by the insured, but is procured by the beneficiary, or by someone else acting in his behalf and at his expense, such beneficiary can not recover on the policy unless he has an insurable interest in the life of the insured;" and later the justice said in his charge: "You see, gentlemen, you will take into consideration whether or not this boy did make this application, whether or not these applications were the applications of the boy or of the husband of the beneficiary as the defendant contends. If they were the applications of the husband and not of the boy, in that case you will come to the second question. If they were the applications of the boy himself, made of his own volition, although he may have been advised to apply for them,

still if that advice was not of such a nature and character as to supplant and overcome his will but leave him as a free agent after he has received the advice, and the application is made by him as a free agent, then, gentlemen, you should return your verdict for the plaintiff for the amount of these policies. If, however, you find that these were not the applications of the boy, that his will was supplanted and overcome by another, that they were the applications in fact of the husband of the beneficiary, then you come to the next question,—Has the beneficiary—did she have an insurable interest in the life of the boy? If she did not, your verdict should be for the defendant.” This exception is overruled.

The defendant also excepted to the refusal of the justice to instruct the jury as requested by the defendant in eighteen different requests to charge. We find no merit in any of these exceptions. As to a number of these requests for instruction, the justice had already embodied the instructions requested in his general charge to the jury. The correctness of the refusal of the justice to grant the other requests to charge have already been sufficiently treated in this opinion.

All of the defendant's exceptions are overruled.

By rescript already filed the case has been remitted to the Superior Court, with direction to enter judgment upon the verdict.

Page and Cushing, for plaintiff.

Edward D. Duffield, Comstock and Canning, Jeremiah E. O'Connell, for defendant.

EARL H. ROBERTS vs. J. ELLIS WHITE, Adm'r.

JANUARY 16, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Rules of Court. Putting Plaintiff on Proof of Capacity of Defendant.*

Where a defendant had failed to give notice to the plaintiff, under the provisions of rule 18 of the Superior Court, to put him upon proof of the character and capacity of the defendant, who was sued as “administrator with

the will annexed," a motion for direction of a verdict, on the ground that plaintiff had not proved the appointment of the defendant as administrator, was properly denied.

Even without such rule, in the absence of a special plea, the representative capacity of defendant would be deemed to be admitted.

(2) *Presentation of Claims in Probate Court. Bills and Notes. Variance.*

In an action upon promissory note, declaration averred that, after decease of intestate, plaintiff "presented said note and his claim thereon to the defendant" (administrator), while the proof showed that the claim was filed in the office of the clerk of the Probate Court:—

Held, that, as the law required that the claim be filed in the Probate Court within a certain time, as a preliminary step to its allowance or to suit thereon in case of disallowance, the declaration was demurrable, although amendable, but as defendant neither demurred nor objected to the evidence offered by plaintiff, and proper presentation of the claim according to law was proved, the defendant could not, on exceptions to direction of verdict for plaintiff, object on the ground of variance.

ASSUMPSIT. Heard on exceptions of defendant, and overruled.

PARKHURST, J. This is an action on a promissory note for \$100.00, given to the plaintiff by one William E. Newell, December 3rd, 1906, and said action is brought against the administrator of said Newell. The case was tried in the Superior Court before a jury on April 13th, 1910, and at the close of the plaintiff's case the defendant requested the court to direct a verdict for the defendant, on the ground that it had not been legally proven that the defendant was the administrator of Mr. Newell's estate. The motion was denied, and exception taken thereto; and, the defendant not offering any evidence, the court thereupon directed the jury to return a verdict for the plaintiff in the sum of \$120.00, and the defendant excepted thereto. The defendant thereafter duly proceeded to file his bill of exceptions, and has duly prosecuted the same to this court.

The exceptions relied upon, as set out in the bill of exceptions, are:

(1) To the ruling of the court in refusing to direct a verdict for the defendant.

(2) To the ruling of the court in directing a verdict for the plaintiff.

- (1) The defendant had failed to give notice to the plaintiff, to put him upon proof of the character and capacity of the defendant, who was sued as "administrator with the will annexed of William E. Newell, late of said Pawtucket, deceased," under the provisions of rule 18, of the Superior Court, which reads as follows: "18. The signature of any party to an instrument in writing, where such instrument is counted upon as the cause or basis of the action, need not be proved to sustain the action unless a notice to prove the same accompany the plea, or unless, upon motion and for cause shown before the cause is called for trial, it be otherwise ordered.

"A like notice shall be given to plaintiffs, suing as a corporation or as copartners, to put them upon proof of their incorporation or copartnership, or of their representative capacity, when suing as executors, administrators, or trustees; and also to put them upon proof of the character, capacity, or condition of parties defendant, as set forth in the declaration, unless issue upon the same be made by special plea."

This rule, with others, was adopted by the Superior Court, with the approval of the Supreme Court, on the seventeenth day of July, 1905, under the provisions of C. P. A., § 34, which reads as follows: "Each of said courts, by a majority of its members, may from time to time make and promulgate rules for regulating practice and conducting business therein, in matters not expressly provided for by law. The rules of the superior court shall be subject to the approval of the supreme court." This provision of statute was re-enacted in Gen. Laws, 1909, chap. 274, § 7, in the same terms. Similar power to make rules of practice was conferred by statute upon the Supreme Court prior to the creation of the Superior Court in 1905 (See Gen. Laws. 1896, p. 758; Pub. Stat. 1882, p. 505; Gen. Stat. 1872, p. 404). And a rule embodying the same provisions was adopted by the Supreme Court on the fourth Monday of March, 1886 (See 15 R. I. p. 631, rule 25; pp. 636, 637), and has been in force ever since; and we are not aware that any

question as to the validity of any portion of the rule has heretofore been raised.

At the close of the plaintiff's evidence, the defendant's counsel moved for the direction of a verdict for the defendant, on the ground that the plaintiff had not proved the appointment of the defendant White as administrator with the will annexed of the estate of William E. Newell, deceased. The court ruled that the plaintiff was not required to make such proof, under the rule above quoted, no notice to prove the same having been given by the defendant. The defendant's counsel excepted to this ruling, and urges in argument, in support of this exception, that rule 18, quoted above, is invalid in so far as it relieved the plaintiff of the necessity of offering evidence to prove the capacity in which the defendant was sued, and further urges that the Superior Court, by its ruling sustaining the rule, has deprived the defendant of his legal right to have the plaintiff's case fully proved before verdict shall be directed in favor of the plaintiff.

The exception is wholly frivolous and untenable, and arises from an entire misapprehension, on the part of defendant's counsel, of the nature of the rule, and of the law governing pleading in such a case. In the absence of any such rule, when suit was brought against an executor or administrator in such capacity, if the defendant intended to deny his being such, he must plead such denial specially, under all the ancient precedents; for unless specially pleaded, his representative character was deemed to be admitted. The special plea of *ne unques executor*, or *ne unques administrator*, was a well-recognized plea in all of the ancient precedents. See 1 Chitty Pl. *489; 3 Chitty Pl. *941, *942 (and notes, 15th Am. ed.); Story's Pldgs. 40. The modern precedents are to the same effect. "In an action against a personal representative, as such, the plaintiff is not required to prove the defendant's representative character, unless it is denied by a plea of *ne unques executor* or *administrator*. A plea by the defendant which involves only a denial of the plaintiff's cause of action, is an admission by the defendant of the character in which he is sued." 8 Ency.

Pl. & Pr. 685; and see cas. cit. note 2, which fully support the text.

The case was tried upon the general issue, no special plea of any kind having been filed; consequently, in accordance with the above authorities, even in the absence of any rule upon this subject, the defendant must be deemed to have admitted his representative capacity, and the defendant's motion for direction of a verdict in his favor was rightly denied.

The rule in question takes away no rights of the defendant, but is, in reality, a favor to the defendant. It permits him by mere notice in writing, accompanying his plea, to put the plaintiff upon proof of the defendant's representative capacity, and relieves him of the necessity of filing a special plea, while it does not deprive him of the privilege of filing a special plea, if he sees fit to do so. The rule, both in the part here particularly under consideration, and in its other provisions, is merely intended to save time and expense both for the court and for the parties, by dispensing with proof of matters as to which there is and can be no honest dispute, and as to which the parties can not truthfully raise a question.

Rules dispensing with the introduction of evidence on points not disputed by the parties have been frequently sustained as reasonable. In *Blair v. Ford China Company*, 26 Pa. Super. Ct. 374, it was held that courts have power to enact rules that items of account and averments in settlement of claims not denied by affidavit shall be taken as admitted. In *Helffrich v. Greenberg*, 206 Pa. 516, it was held that a rule requiring executors, administrators, etc., to file affidavits of defence was valid. In *Hogg v. Charlton*, 25 Pa. St. 200, it was held that, independent of statute, courts may by rule require an affidavit of defence. See also *Standard Underground Cable Company v. Johnstown Tele. Co.*, 26 Pa. Super. Ct. 432; *Fox v. Conway Fire Ins. Co.*, 53 Me. 107; 11 Cyc. 741, note 36.

In *Odenheimer v. Stokes*, 5 Watts & Serg. 175, it was held that a rule, requiring the defendant to deny by affidavit the execution of an instrument on which suit is brought, or to deny the partnership by affidavit in a suit against a partner,

in order to put the plaintiff to proof, is valid. The court says, p. 177: "The distinction between a rule of court which tends to alter the law of evidence, and one which is established merely for the regulation of practice, is strikingly illustrated in the two cases on this subject decided in the Supreme Court of the United States. In *Doe v. Winn* (5 Pet. S. C. Rep. 233), it was held that the Circuit Court could not by rule of court change the right of a party to introduce secondary proof of a writing alleged to be lost; and therefore a rule requiring the oath of the party, in addition to the usual proof, was invalid. But in *Mills v. The Bank of the United States* (11 Wheat. 431), it was determined that the court might make a rule dispensing with proof of a bond, note, etc., unless the defendant filed with his plea an affidavit denying the execution of the instrument; and that is the case now before us. The reasons given for this decision by Mr. Justice Story are satisfactory and conclusive. The object of such rule is to prevent unnecessary expense, and useless delays or objections, often frivolous. It does not interfere with the rules of evidence. It does not take away the right to demand proof of execution, but only requires the party to give notice by affidavit that he means to contest the fact. Not doing so is a waiver of objection.

"It was decided in that case to fall within the power to regulate the practice for the advancement of justice, and especially, to that end, to prevent delays in the proceedings. Under the same general power given to the courts by Act of Assembly, it was held by this court, in *Vanatta v. Anderson* (3 Binn. 416), a case warmly contested, that the court might require of the defendant an affidavit of defence, and direct judgment to be entered if it were not filed within sufficient time. It appears to me that the power exercised in the present case by no means goes as far as that exercised in *Vanatta v. Anderson*."

- (2) The defendant's counsel raises the further point that the court below erred in directing a verdict for the plaintiff because there was a variance between the declaration and the proof, in that the declaration averred that the plaintiff, after the death

of William E. Newell, "presented said note and his claim thereon to the defendant," etc., while the proof showed that the claim was filed in the office of the clerk of the Probate Court. The law required that the claim be filed in the office of the clerk of the Probate Court, within a certain time, as a preliminary step to the allowance of the claim, or to suit thereon in case of its disallowance (C. P. A. § 883 *et seq.*) The declaration was plainly demurrable, and if the defendant had demurred, it would have been in the discretion of the court to have allowed the plaintiff to amend, under the provisions of Gen. Laws, chap. 285, § 4, which reads as follows, in part: "and the court may at any time permit either of the parties to amend any defect in the process or pleadings, with or without terms, in the discretion of the court, or in pursuance of general rules." And see *Hebert v. Handy*, 28 R. I. 317, 318; *Taylor v. Superior Court*, 30 R. I. 560, 569.

The defendant did not demur; nor did he object to the evidence offered by the plaintiff to show that the claim was in fact filed in the office of the clerk of the Probate Court according to law; if he had raised the point at any time during the trial, the plaintiff would, undoubtedly, have been allowed to amend. Inasmuch as the plaintiff did prove proper presentation of the claim according to law, no such point is now open to the defendant upon their exceptions.

The defendant's exceptions are therefore overruled, and the case is remitted to the Superior Court with direction to enter judgment upon the verdict for the plaintiff.

Littlefield and Barrows, for plaintiff.

Bassett and Raymond, for defendant.

R. W. Richmond, of counsel.

EDMUND B. SHELDON vs. SUSAN F. C. WILBUR, Admx.

JANUARY 20, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Evidence.*

Where an immaterial question which, considered by itself, would not be likely to produce any results of which the adverse party could complain, received an answer irresponsive to the question; but no objection was taken to such answer, and no request made to have it stricken out, and no objection taken to remarks of the court which were also irrelevant under the circumstances, an exception to the ruling of the court, admitting the question, will be overruled.

(2) *Evidence.*

Where testimony had been offered without objection, as to certain deposits of decedent in various banks, then the inventory of the estate was admitted after objection, and thereafter further testimony covering the deposits referred to in the inventory was introduced, also without objection, the admission of the inventory was not prejudicial.

(3) *Charge to Jury.*

Where no exception is taken to a charge and no special requests to charge are preferred, it must be considered that the charge correctly stated the law of the case.

ASSUMPSIT. Heard on exceptions of plaintiff, and overruled.

PER CURIAM. This is an action of assumpsit wherein the declaration is in two counts, whereof the first sets out the making of a promissory note by Abbie A. Hoxsie since deceased, for the sum of one thousand dollars, value received, payable to said Edmund B. Sheldon on demand, with interest. The second count contains the common counts in assumpsit for the sum of one thousand dollars. Each count contains an averment of due presentation of the claim against the estate of said decedent. In addition to the general issue, the defendant denied that the decedent signed the note in question, and gave notice to the plaintiff to prove the signatures, not only of the maker, but also of the witnesses to the note in suit. The defendant also alleged that the plaintiff did not file his claim in the office of the clerk of the Probate Court, according to law.

The case was tried in the Superior Court, and after verdict for the defendant the plaintiff filed his motion for a new trial upon the ground that the verdict was against the law and evidence, and, this motion being denied, the plaintiff duly excepted thereto and gave notice of his intention to prosecute a bill of exceptions upon all the exceptions taken at said trial. The plaintiff thereupon duly prosecuted his bill of exceptions, wherein he relies upon the three following:

"I. The said defendant offered at said trial, to support the issues on her part, a certain witness, to wit, one William B. Matteson, and of him, asked the question, 'Did you ever know of any bill that she owed during the time you were with her?' to which the said plaintiff, by his counsel, objected, which objection the Court overruled, and allowed the said witness to make the answer, 'she said that she calculated to keep her bills paid up, with the exception of me and Halsey Clarke—we did writing—she calculated to keep them paid; sometimes she was afraid she would be a little short,' to which ruling of the said court, in overruling the objection and permitting said witness to make answer, the said plaintiff then and there duly excepted.

"II. During the trial of said cause the defendant, by her counsel, presented and offered in evidence the appraiser's report on the estate of Abby A. Hoxsie, to show what the assets of such estate were at the time of her decease, to the introduction of which in evidence, the plaintiff, by his counsel, objected, which said objection the court overruled, and allowed the inventory of the estate of Abby A. Hoxsie to be introduced in evidence, to which said ruling of the said court in overruling said objection and permitting the aforesaid inventory to be introduced in evidence, the said plaintiff then and there duly excepted.

"III. That the said jury, under the instructions of the said Court, took the case under consideration, and returned a verdict for the said defendant, and thereafterwards within the time prescribed by law, to wit, on the — day of September, A. D. 1909, the said plaintiff, by his counsel, did file his motion in writing to set aside the said verdict of the said jury and grant

a new trial therein upon the grounds following, that is to say (a) 'that the verdict is against the law,' (b) 'that the verdict is against the evidence and the weight thereof,' and hearing thereon was had on the 19th day of November before the said Court at South Kingstown, aforesaid; but the Court refused to grant said motion, to which ruling of the court to grant said motion, the said plaintiff, by his counsel, then and there duly excepted."

In order to appreciate the situation in which the question referred to in the first exception was asked, it may be well to state that the plaintiff had testified that the note in suit was given for work, labor, etc., performed during the years from 1895 to 1907, inclusive; that the witness had sworn that he lived at Abbie A. Hoxsie's fourteen or fifteen years; that the questions and answers immediately preceding the question under consideration were as follows: "Q. 69. How was she at that time? A. Well, she was weak. She seemed to have all her abilities all right. She knowed me, and talked very distinctly and plain, everything all right. She appeared to be (1) a little weak. Q. 70. She knew you better than anyone else? A. Oh, yes. Q. 71. Did she ever say anything to you about a note she made, at that time? A. No, sir; she never did." The question asked is framed so as to call for a categorical answer, founded upon the personal knowledge of the witness. It is not adapted to extract information concerning the habits of the decedent. It was an immaterial question, and, considered by itself, was unlikely to produce any results of which the plaintiff would have a right to complain. The answer, it is true, did contain a statement of what the decedent said. This was irresponsive to the question, but no objection was made to the answer, nor was there any request to the court to have the same stricken out. The ruling of the court to which exception was taken was the ruling permitting the question to be asked. The remarks of the court concerning the habits of a person, etc., were irrelevant, because no such question was then before the court. The exception was not taken to the remarks,

but to the ruling of the court. The exception is, therefore, overruled.

- (2) The second exception is likewise without merit. The evidence, inventory of the estate of Abbie A. Hoxsie, concerning which the objection was offered, was first referred to in the manner following: Oscar E. Barber, called as a witness for the plaintiff, testified as follows: "Q. 8. Did Halsey P. Clarke qualify as executor of the will of Abbie A. Hoxsie? A. Yes, sir. Q. 9. When? A. I don't know whether that paper is here, or not. All the papers I have here are what was turned over to me. I don't think that paper is here. MR. OLNEY: Is there any dispute about that? WITNESS: He qualified,—the inventory here is returned. MR. TIRRELL: I don't think there is any dispute about it. MR. OLNEY: That is admitted." However, the inventory was not tendered in evidence at that time, and when it was offered it corroborated testimony for the defendant which had been given without objection upon the part of the plaintiff, as follows: William B. Matteson, called as a witness for the defendant, testified: "Q. 14. Now Mrs. Hoxsie had some little money in the bank, did she not? A. Yes, sir. Q. 15. Do you know what bank she had the money in? A. She had money in East Greenwich, Wickford, Kingston, and two banks at Westerly. Q. 16. You knew by the bank books that she had? A. Yes, sir. Q. 17. Where did she keep them? A. She kept them in her desk. Q. 18. After she died what became of them? A. After she died, a little previous to her death, she requested me to lock them up until her will was probated. Q. 19. Did she say anything about locking them up until the will was probated? A. No. Q. 20. You took care of them for her? A. I took care of them up till the will was probated and delivered them to Mr. Clarke, the executor."

It appeared from the inventory that there were certain deposits in savings banks and trust companies amounting to a little over thirty-three hundred dollars. After the introduction of the inventory, Mr. Tirrell was called by the defendant, and, without objection, testified fully concerning the bank books

of Abbie A. Hoxsie and her deposits in the various institutions referred to in the inventory. We are unable to discover that the introduction of this evidence was prejudicial to the plaintiff, and this exception is therefore overruled.

The third exception is to the refusal of the trial court to grant the plaintiff's motion for a new trial on the grounds that the verdict is against the law, and against the evidence and the weight thereof.

- (3) The plaintiff took no exception to the charge given by the court to the jury; preferred no special requests, and was apparently satisfied therewith. It must, therefore, be considered that such charge correctly stated the law of the case; and we do not find that the verdict of the jury is against the law as so stated. The jury saw and heard all the witnesses, and had full opportunity to judge of their credibility. The jury were bound to determine and decide, upon all the evidence before them, whether or not the deceased Mrs. Hoxsie did as a matter of fact authorize and direct the drawing the note and the signing thereof, and did make her mark thereon; whether she intended the note as a gift, or as payment of a debt; whether she understood the purpose and effect of the instrument at the time of its execution. And in coming to their conclusion as to these questions, the jury had, and undoubtedly exercised, the right to weigh all the testimony, to consider the age, illiteracy, and serious illness and weakness of the deceased, the fact that she was at the time in the home of and under the care of the plaintiff and his wife, and subject to their influence; also to consider the testimony of the plaintiff himself; that he had kept an itemized account of his twelve years' services, together with other accounts, in a small pocket memorandum book, like a diary, and that the items were carried out in definite amounts and added up; and that he had never demanded any money or suggested payment of this long standing account from the deceased until just before she made the note in suit, and while she was ill at his house; that it does not appear that he had ever shown this book or account to any one (save possibly to his wife), except the deceased, and that he had never

made any claim upon her, or showed her this account, until just before the date of the note; that he had lost the book between the date of the note and the date of trial, and was only able to testify in the most general and meagre way, with very little detail, about the items of this account which he had so carefully kept for so many years. Since the jury, under proper instructions of the court, after weighing all these facts and circumstances and all the other facts in the case, and seeing and hearing the witnesses, have found a verdict for the defendant, which has been approved by the judge who presided at the trial, we are unable to say that such verdict was not warranted by the evidence. This exception is therefore overruled.

The case is remitted to the Superior Court, with direction to enter judgment upon the verdict for the defendant.

Frederick C. Olney, for plaintiff.

Walter H. Barney, Prince H. Tirrell, for defendant.

RUTH BAXTER *et al.* vs. JOSEPH L. PATENAUDE.

JANUARY 20, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Evidence.*

An answer to an interrogatory is properly ruled out, where it appears that deponent could not have testified to the fact of her own knowledge, and it does not otherwise appear that she was qualified to testify as to such fact.

(2) *Hearsay Evidence.*

Upon the issue of ownership of the *locus* in an action of trespass and ejectment, Q. "What do you know about the ownership of this lot? A. Well, I was always told, my earliest remembrance, that it was grandmother's. Q. Who told you this? A. My mother." It appeared that the grandmother deceased when witness was four years old.

Held, properly excluded as hearsay testimony.

(3) *Evidence.*

"Q. Do you know whether your mother or grandmother or any member of your family, ever drove off trespassers or exercised any dominion or ownership over this land? A. My grandmother has had plats made, which I have seen, and she has also, so I have always understood, been on and ordered people off."

Held, that the question called for personal knowledge and the answer was irresponsible and also objectionable as hearsay.

(4) *Evidence. Admission de bene.*

A court sitting without a jury in allowing a qualified admission of papers or records *de bene*, is in the exercise of a reasonable discretion, and where it does not appear that any consideration was given to the evidence so admitted after objection, the exception to such admission will be overruled.

(5) *Trespass and Ejectment. Title.*

In 1870, X. caused plats of certain unimproved property to be made and recorded, which plats included the "*locus in quo*." Prior to that time he had fenced in a portion of the property including the "*locus*." Thereafter he staked out lots, graded streets, and posted advertisements on the land and publicly sold house lots and asserted his ownership thereof. There was no evidence that the predecessors in title of plaintiff or any other person sought to interfere with these acts of ownership, until the issuing of the writ in trespass and ejectment 26 years thereafter. Both plaintiff and defendant claimed under paper titles from a common ancestor.

Held, that the paper title of the defendant was as good as that of plaintiff, and that such possession of the land as had existed had been upon the part of ancestors in title of the defendant.

(6) *Taxation. Notice to Party Holding Interest in Property.*

A tax deed has no binding force against a party whose interest in the property which is the subject of sale appears upon the records, unless the notice required by statute has been given such party in interest.

TRESPASS AND EJECTMENT. Heard on exceptions of plaintiff, and overruled.

DUBOIS, C. J. This is an action of trespass and ejectment brought to recover possession of a certain tract of land in Pawtucket, Rhode Island. The death of Ruth Baxter has been suggested on the record and the only plaintiff, who now makes claim to the property in question is Olive Z. Edson. The plaintiff in her declaration alleges that on January 1st, 1890, she was seized and possessed of certain land in said Pawtucket, with improvements thereon, laid out and designated as part of lots numbered 4, 5, and 6 on that plat known as the Edwin Darling plat, which is recorded in the office of the city clerk of said Pawtucket on plat card 143, and bounded and described as follows: Beginning at a point in the southerly line of Rock avenue, one hundred feet east of the easterly line of Mendon

avenue, thence easterly fifty feet and holding that width extends back at right angles to Rock avenue, about one hundred and twelve feet; and that the plaintiff being so possessed, the said defendant afterwards, on the second day of August, 1897, and on divers days between said date and the date of the plaintiff's writ, with force and arms broke and entered upon the premises and with like force and arms ejected the plaintiff therefrom. The defendant pleaded the general issue and the parties entered into a written stipulation that the defendant be allowed to show under said plea any matter available under any special plea in bar, provided that notice of what he intended to prove should be given to the plaintiff's attorney at least thirty days before trial. The defendant gave the requisite notice that he would set up adverse possession in himself or his ancestors in title for more than twenty years. Jury trial having been waived, the case was tried before the presiding justice of the Superior Court, who rendered the follow decision:

"TANNER, P. J. This is an action of trespass and ejectment to try title.

"One of the plaintiffs and also the defendant have traced their paper title to descendants of the same ancestor, John Reed, who acquired the land in question under the original allotment. There being no law of primogeniture shown to have existed at the time, we must presume that each of the children of John Reed inherited the land in question. Therefore, it seems to us that the paper title of the defendant is as good as that of said plaintiff. Such possession as has existed has been on the part of the ancestors in title of the defendant. We do not, however, think it amounts to enough to establish the plea of adverse possession. The plaintiff has, however, in our opinion, failed to show any superior title to that of the defendant.

"As to the tax deed, the tax upon which the deed was given was assessed against the title of the plaintiff, and at that time the ancestor in title of the defendant had his deeds upon record showing his title.

"We understand that under the statutes of this State a tax

sale levied against one party does not bind another party whose interest is shown upon the record without notice to that party. We also understand that a tax deed is *prima facie* evidence only of the facts recited in the deed. We find in the tax deed no recital of any notice to the ancestor in title of the defendant at the time of the sale.

"Such deed is ineffectual as against the defendant.

"Decision for defendant."

Within the time prescribed by law, the plaintiff, Olive Z. Edson, excepted to the foregoing decision and took the necessary steps to maintain a bill of exceptions, and on June 30th, 1910, filed her bill of exceptions, which was subsequently allowed in due course. The exceptions relied upon are as follows:

"2nd. To the ruling of the trial justice refusing to admit in evidence questions 41 and 42 put to Lula M. Powers, and her answers thereto, in her deposition in perpetual memory.

"3rd. To the ruling of the trial justice in refusing to admit in evidence question 63 put to Lula M. Powers and her answers thereto, in her deposition in perpetual memory.

"4th. To the ruling of the trial justice in refusing to admit the last part of the answer of said Lula M. Powers to question 66 in her deposition in perpetual memory.

"5th. To the ruling of the trial justice admitting in evidence the defendants' exhibit No. 4. consisting of a certified copy of an action of trespass and ejectment brought by Truman Freeman against Henry W. Charlton, &c.

"6th. To the finding contained in the rescript that the paper title of the defendant is as good as that of the plaintiff.

"7th. To the finding contained in the rescript that such possession (of the land in question) as has existed, has been upon the part of the ancestors in title of the defendants.

"8th. To the finding contained in the rescript that the plaintiffs have failed to show any superior title to that of the defendant.

"11th. To the finding contained in the rescript that such

deed (the tax deed, plaintiff's Exhibit No.) is inefficient against the defendant.

"12th. To the decision of the trial justice in favor of the defendant, the plaintiff claiming that such decision is against the evidence and the weight thereof.

"13th. To the decision of the trial justice in favor of the defendant, the plaintiff claiming that such decision is contrary to law."

- (1) The questions and answers referred to in the second exception are: "Q. 41. Is the lot of land inventoried in the inventory accompanying this instrument and therein designated as 'The Pine Lot on the Great Plains at four hundred dollars' the same lot of land as the lot of land in dispute in these different cases? A. The pine lot on the great plains is the lot of land in dispute in these cases. Q. 42. Is the Pine Lot on the Great Plains in dispute in these cases and the Pine Lot of land mentioned in this instrument, the same lot of land or not? A. They are." As it appears, in her deposition, that the inventory referred to was made in a partition proceeding wherein the petition was dated April, 1 1833, and as it also appears that at the time of giving her deposition, October 12th, 1908, Mrs. Powers was but thirty-five years of age, it is manifest that she was not present at the preparation of the inventory and cannot testify of her own knowledge what pine lot is therein referred to, or concerning its location or area, and it does not appear from her deposition or otherwise in the case that she was qualified to testify concerning the identity of the land in dispute with the land so inventoried. The ruling was therefore correct.
- (2) The question and answer referred to in the third exception are: "Q. 63. What do you know about the ownership of this lot of land?" (Pine lot on the Great Plains) "A. Well, I was always told, my earliest remembrance, that it was grandmother's." The next question is: "Q. 64. Who told you this? A. My mother." It also appears in her testimony that her grandmother died when the witness was four years old.

This was plainly hearsay testimony and was properly excluded by the court.

- (3) The question and answer involved in the fourth exception read as follows: "Q. 66. Do you know whether your mother or your grandmother or any member of your family, ever drove off trespassers or exercised any dominion or ownership over this land? A. My grandmother has had plats made which I have seen, and she has also, so I have always understood, been on and ordered people off." The question calls for personal knowledge and the answer is irresponsible. The last part of the answer is also hearsay testimony and plainly objectionable, on that ground.

- (4) The fifth exception has reference to the ruling of the presiding justice admitting in evidence the certified copy of an action of trespass and ejectment brought by Truman Freeman against Henry W. Charlton. It appears from the record that this was an action for damages for cutting and carrying away wood. The defendant entered the following plea in justification: "I claim to own the land on which the wood charged in the annexed writ was cut belonged to me, to wit, the lot of land described as follows bounded west by a two rod way leading across the plain in Pawtucket on the north by land of George Bucklin, on the east by the old Boston & Newport road and on the south by land of Seba Kent, and that the wood cut on said lot belonged to me, and not to Truman Freeman as he claims. Pawtucket, March 24, 1845, Henry W. Charlton." That case was tried on that issue by referees to whom the case was submitted by the parties under an agreement whereby the award was to be reported to the court of Common Pleas for the county of Bristol, Massachusetts, and the finding of the referees was that "said Charlton did take the wood mentioned in said Freeman's writ and that in so doing he committed a trespass upon said Freeman's property" whereupon they awarded damages for taking the wood and costs and upon said award being reported to the said Court of Common Pleas judgment was entered by said court in favor of said Freeman against said Charlton for said damages and costs.

The plaintiff claims that the admissibility of this very evidence has been passed upon by this court in the case of *Baxter v. Brown*, 26 R. I. 381, wherein Douglas, J., speaking for the court, said (p. 382): "The defendant proposes, as a piece of newly discovered evidence, the report of referees, under a rule of court, in an action brought by Truman Freeman against Henry W. Charlton, March 8th, 1845, to recover damages for carrying away one cord of wood. Charlton pleaded that the land on which the wood was cut belonged to him, and described the whole of the Pine Lot, which was the subject of partition between the children of Zelinda Jacobs. Charlton's wife was one of these children, and it is argued that the finding of referees that Charlton was guilty was a finding that Freeman owned the land in question and is conclusive evidence against the plaintiff's title. Such a contention is not sustained for several reasons. In the first place, the referees may as well have found that the wood was not cut upon the land described, as that the land described was the property of Freeman. Next, Mrs. Charlton was not a party to the case, and her title, if she had any, was not concluded by the suit against her husband. Again, the plaintiffs do not claim title through Mrs. Charlton, but from her sister, Ruth Bishop, to whom, and not to Mrs. Charlton, the eastern twenty-six acres of the Pine Lot were set off. Finally, an action of trespass *quare clausum* would not have concluded the title (*Morse v. Marshall*, 97 Mass. 519, 522), much less an action of trespass *de bonis asportatis*." The plaintiff claims that this reasoning is conclusive, even though in the case now at bar, she does in part claim title derived through Mrs. Charlton, her aunt.

The record was not offered in the present case as conclusive evidence against the plaintiff, it was introduced in the following manner: after the counsel for the plaintiff had stated as follows: "I think that is all except our plats and the testimony of our engineer," Mr. Bassett, counsel for the defendant, then addressed the court as follows: "We desire to introduce our testimony and I think we had better put in our paper title, and after we have put in our paper title we will go on to

something else." Then he proceeded to introduce certain exhibits which were respectively numbered,—one, which contained allotments of the proprietors of Rehoboth to various persons including Leonard, Dogget, John Read, Sr., Woodcock and Bowen, Patterson and Matthews. Number two, deed from Daniel Freeman to Truman Freeman. Number three, deed from Remember Carpenter *et al.* to Truman Freeman; he then continued: "Exhibit number four is a certified copy of an action of trespass and ejectment brought by Truman Freeman against Henry W. Charlton, and the copy is a certified copy of the record of the clerk of the Superior Court of the Commonwealth of Massachusetts, which has custody of the files of the late Common Pleas Court, which were by law transmitted to said Superior Court." The transcript then contains the following: "Objected to, admitted *de bene*, and plaintiff's exception noted. Copy of action of trespass and ejectment marked defendant's exhibit 4." It does not appear anywhere in the transcript, or in the rescript of the court that any consideration was given or weight attached to exhibit No. 4. No harm was done in admitting the same *de bene* for the purpose of further examination and deliberation and it does not appear that any harm has come to the plaintiff from its admission in evidence to the extent that it was. A court sitting without a jury often allows a qualified admission of papers or records *de bene* with the idea of passing upon their admissibility later on in the trial of the case rather than to interrupt the proceedings at the time by hearing arguments for and against the introduction thereof. It seems like the exercise of a reasonable discretion. As there does not seem to be any reason to apprehend that the plaintiff was injured by the introduction of the exhibit the exception will avail him nothing.

- (5) The sixth, seventh, eighth, eleventh, twelfth, and thirteenth exceptions may well be considered together for they are specifications of the claim that the decision is against the law and the evidence and the weight thereof. The decision complained of is contained in the rescript aforesaid.

The plaintiff attempts to trace her title as follows: From John Read, to whom an allotment of land, said to include the land in question, was made under a joint agreement of the inhabitants of Seekonk, Mass., in 1643. John Read married and had children, among whom was Moses, who married Rebecca Fitch and had issue, a daughter Mary Read. In the absence of evidence it may be deemed that John Read and Moses Read each deceased intestate and as no conveyances are found to the contrary it is presumed that Mary Read inherited the land of her father Moses Read. Mary Read married John Bishop and had issue, John Bishop, and she died three weeks after his birth, intestate, and, for anything that appears in the case, without having made any conveyance of the real estate which she inherited from her father. After her death her husband married again and died in the year 1748 testate; his will was duly proved in the same year. There is nothing in his will to indicate that he claimed to own any of the land in suit. He left the "sole improvement" of certain of his real and personal estate to his widow during her natural life with remainder to the one of his three grandsons, children of his son John Bishop, whom his widow should choose to live with her. She made choice of Phaniel Bishop, who married and became the father of three children: Phaniel, William, and Zelinda. Phaniel Bishop Sr. died testate and left his real estate to his three children aforesaid by his will dated in 1810. By a quitclaim deed dated October 3, 1812, Phaniel and William Bishop conveyed to their sister Zelinda Bishop certain lands including "one lot called the Great Plain contents in acres agreeable to our honored Father's deeds be the same more or less." There is no evidence that this deed was ever acknowledged or delivered in the lifetime of any of the persons therein named, and nothing appears in reference to the same until nearly fifty years after the date thereof when, on September 10, 1861, it was "acknowledged in open court" under Mass. Gen. Stats. cap. 89, § 21, by proving the signatures of the grantors and that of one of the subscribing witnesses thereto. Zelinda Bishop married John Jacobs. Their children were Phaniel,

Ruth, Joseph and Zelinda Jacobs. These children made partition of the land on the Great Plains. In the inventory accompanying the petition for partition, dated April 1, 1833, appears: "The Pine Lot on the Great Plains at four hundred dollars." Zelinda Bishop Jacobs married Henry W. Charlton. By deed dated August 4, 1876, she conveyed her interest in these Great Plains "divided to me in my mother's estate" to her niece Olive Zelinda Jacobs, the daughter of her brother Phaniel B. Jacobs. Olive Z. Jacobs married Seth Read Edson and is the plaintiff in this case. Upon failure to pay the taxes on the whole five and a half acres they were sold at public auction and conveyed by Earl S. Binford, Collector of Taxes, to Samuel Shove, by deed dated June 27, 1878. Samuel Shove conveyed the same premises to Olive Z. Jacobs by deed dated February 24, 1880. Whereupon the plaintiff makes the following claim: "The record title to the lot in question in this suit is therefore in the plaintiff, Mrs. Olive Z. J. Edson, through the following line from the original allottee, namely, John Read, Moses Read, Mary Read who married John Bishop, Hon. Phaniel Bishop, his grandson, Zelinda Bishop who married Captain John Jacobs, their daughter Zelinda Bishop Jacobs, who married Henry W. Charlton and conveyed her interest and her deceased brother's, Joseph W. Jacobs, interest to her niece, Olive Zelinda Jacobs, daughter of her brother, Phaniel B. Jacobs, now the wife of Seth Read Edson the plaintiff in this case, who, in further assurance of title, has a deed from Samuel Shove who bought the premises at a tax sale. We submit confidently that the plaintiff presents the better claim thereto, and the stronger and more complete line of documentary evidence." But this claim is followed by this concession: "It may be claimed that there is no evidence of any conveyance from Mary Read, the granddaughter of John Read, who married John Bishop. There is a gap in the records of Rehoboth and we are therefore unable to say, from proof from the records of real estate, that Mary Bishop conveyed this land to her husband;" and thereupon it is argued: "There is a presumption of the existence of deeds that are referred to

in old wills and deeds (*Fletcher v. Fuller*, 120 U. S. 534) and this presumption is supported in this case by the fact that these brothers Phaniel and William Bishop thus conveyed to their sister Zelinda Bishop this land, claiming it as part of their father's property."

There is an earlier gap in the plaintiff's title than the one just suggested. It does not appear why Moses Read should be selected by the plaintiff as the sole heir of his father John Read, and no deed or will is presented continuing the title in the land in dispute from John to Moses. But even if we assume that the title did pass from John through Moses to Mary Read, who died three weeks after the birth of her son John Bishop, there is no evidence of any conveyance of the land by her or that she left a will. Even assuming that her husband who survived her had an estate in freehold *jure uxoris* in her real estate, which, upon the birth of his son John Bishop, merged into an indefeasible estate (estate by curtesy) for his own life which he might convey,—see *Martin & Goff v. Pepall*, 6 R. I. 92. 95,—nevertheless it was but an estate for life and the remainder in fee was vested in his son John as heir of his mother. The plaintiff, ignoring this condition of affairs, attempts to trace her title through John Bishop Senior by means of his will to Phaniel Bishop, whose children by the quitclaim deed do not rely upon any deed from Mary Read to her husband or upon John Bishop's will in favor of Phaniel but convey "agreeable to our honored Father's deeds," and no deeds to Phaniel are produced. The quitclaim deed itself having been mislaid or secreted or treated as being of no particular consequence for nearly half a century, can not be regarded as a particularly strong link in the chain of title. If the children of Zelinda Jacobs knew of its existence when they petitioned for partition, they did not treat it as having any present value, for it was not acknowledged or recorded for nearly thirty years thereafter.

The defendant also claims that his title to the land in dispute is derived from John Read to whom the land was originally allotted as hereinbefore set forth. That the title was trans-

mitted from parent to child by operation of law as follows: John Read aforesaid married and had issue, among whom was John Read his son; the latter married Sarah and had issue, Timothy, who married Johanna and had issue, Daniel and Johanna; Daniel Read married Huldah and had issue, Betsey; Johanna Read married Daniel Freeman and had issue, William and Daniel, who married respectively Molly and Sarah Horr; William and Molly Freeman had issue; Welcom Freeman and Ezra Read Freeman; Daniel and Sarah Freeman had issue; Truman Freeman. Betsey Read married Remember Carpenter and had issue; Albert, Remember Read, Sumner and Dwight Gardner Carpenter. Ezra Read Freeman aforesaid married Phebe Horr and had issue, Milton Freeman.

The same objections made to the title of the plaintiff will apply to that of the defendant; why the defendant should select John Read as the sole heir of his father is no more apparent than the plaintiff's reason for the selection of Moses Read for the same purpose. If John Read senior died intestate and, without having disposed of his real estate by deed, it descended to his heirs at law in equal shares. In addition to the pedigree hereinbefore referred to the defendant relies upon the following documentary evidence: a deed from Daniel Freeman to Truman Freeman dated March 11, 1844, duly recorded and purporting to convey all the grantor's right, title, and interest in and to certain lots of land in Pawtucket on the Plain which lots were laid out to John Read; deed of Remember Carpenter and his wife Betsey, Ezra R. Freeman, Welcome Freeman and Martin Freeman to Truman Freeman, dated March 11, 1845, and duly recorded, conveying two lots of land situated in Pawtucket on the Plain, which lots were laid out to John Read. The certified copy of the action of trespass and ejectment (hereinbefore referred to); will of Truman Freeman dated February 8, 1850, probated June 25, 1853, by which the residue of his estate, after certain pecuniary legacies is given to his son Henry A. and his daughter Mary A. Freeman, who married John H. Crawford; deed of John H. and Mary Crawford to Henry A. Freeman, dated May 1st, 1865,

and duly recorded, conveying all her right, title, and interest in and to a tract of land in Pawtucket, bounded on the north by land of Mathews, west by the Mendon road, south by land of Elisha Godfrey and James Farris, and east by the old Boston and Newport road; warranty deed from Henry A. Freeman to Abraham Hunt, dated April 6, 1867, and duly recorded, conveying certain land in Pawtucket commencing at the northwest corner of said Hunt's land on the Mendon road, so-called, and running easterly on land of said Hunt and George Hughes to land of Elisha Godfrey; thence northerly on said Godfrey's land $8\frac{1}{2}$ feet; thence easterly on said Godfrey's land 944 feet; thence southerly on the Godfrey land to the Taunton road; thence easterly on the Taunton road to the Boston and Newport road; thence northerly on the Boston and Newport road 42 feet to land of Thomas Bucklin; thence northwesterly on said Bucklin's land 160 rods to said Mendon road; thence southerly on said Mendon road 368 feet to the first mentioned bound; warranty deed Abraham Hunt to Edwin Darling dated March 1, 1869, and duly recorded, conveying the last described land. Quitclaim deed from George Hughes to Edwin Darling, duly recorded, conveying a certain lot of land in Pawtucket, lying on the Plain and bounded as follows: "Beginning at the northwest corner of said lot, thence running southerly by the Mendon road, so-called, seventy-four feet to a stone set in the ground for a corner, thence easterly four hundred and one feet to said Darling's land, being in a straight line to another stone bound, a corner of land this day sold by said Darling to me, thence westerly to the first bound, the place of beginning, meaning to sell all the land I have north of a line from said stones set in the ground;" warranty deed, duly recorded, from Edwin Darling to Sumner Fifield of lots 4, 5, 6, 7, and 8 on plat No. 2 of house lots belonging to Edwin Darling; mortgagee's deed duly recorded, Sumner Fifield by mortgagee conveying the same lots of land to Lyman M. Darling; warranty deed, duly recorded, of same lots of land from Lyman M. Darling to Mary E. Darling, wife of Edwin Darling; warranty deed, duly recorded, Edwin Darling and Mary E.

Darling his wife, in her right to Joseph L. Patenaude, dated November 9, 1891, and conveying a certain lot or parcel of land with all the improvements thereon, situate in Pawtucket, Rhode Island, and laid out and described as follows, commencing at a point one hundred feet from Mendon road on Rock avenue, thence southerly parallel with Mendon road one hundred and twelve feet, thence easterly on line of land of Joseph J. Fournier fifty feet, thence northerly on line of land of said Fournier one hundred and twelve feet to Rock avenue, thence westerly on Rock avenue, fifty feet, to the first mentioned point, on the E. Darling plat No. 2, on the southerly side of Rock avenue. This is the land in dispute and comprises portions of lots 4, 5, and 6 on the Edwin Darling plat No. 2 hereinbefore referred to.

According to the testimony the first attempt to attract the attention of the public towards the land in question was that made by Edwin Darling, who caused plats of house lots of the same to be made and recorded. The plat which includes the *locus in quo* was entitled: "Plat No. 2, of House Lots belonging to Edwin Darling, surveyed and platted by Cushing & Dewitt, December 1870." Edwin Darling not only caused the land to be platted, but also, before that time, had fenced in a portion of the same, including, as is claimed by the defendant with much plausibility, the land now held by him. Not only that but after platting the land Mr. Darling staked out the lots and plowed and graded the streets, and posted advertisements on the land and publicly sold house lots thereon and otherwise actively and publicly asserted his ownership thereof, and there is no evidence that the predecessors in title of the plaintiff or any other person objected or sought to interfere with him in the exercise of his acts of ownership so openly and conspicuously asserted. The writ in the case at bar is dated August 7th, 1897, more than twenty-six years after said plat was recorded. Since that time numerous houses, a fire station, and a church have been erected upon the land so platted by Edwin Darling.

In these circumstances we are of the opinion that the pre-

siding justice of the Superior Court did not err in his findings that the paper title of the defendant is as good as that of the plaintiff and that such possession of the land as has existed has been upon the part of the ancestors in title of the defendant.

- (6) The law governing the sale of land for taxes at the time the five and one-half acres of land, referred to in the deed from Earl S. Binford, Collector of Taxes, to Samuel Shove, dated June 27, 1878, were sold at public auction for non-payment of the taxes thereon, is contained in Gen. Stats. (1872) cap. 41 whereof sections 9, 10, 11, 12, 13, and 15 read as follows:

"Sec. 9. The collector may advertise and sell any real estate liable for taxes, in the manner hereinafter directed.

"Sec. 10. In all cases where any parcel of real estate is liable for payment of taxes, so much thereof as is necessary to pay the tax, interest, cost, and expenses, shall be sold by the collector, at public auction, to the highest bidder, after notice has been given of the levy, and of the time and place of sale, in some newspaper printed or published in the town, if there be one, and if there be no newspaper printed in the town, then in some newspaper printed or published in the county, at least once a week for the space of three weeks, and the collector shall also post up notices in two or more public places in the town, for the same period.

"Sec. 11. If the person to whom the same is taxed be a resident of this state, the collector shall, in addition to the foregoing, cause notice of his levy, and of the time and place of sale, to be left at his last and usual place of abode, or personally served on him, at least twenty days previous to the day of sale.

"Sec. 12. In case the collector shall advertise for sale any property real, personal, or mixed, in which any person other than the person to whom the tax is assessed has an interest, he shall, provided the interest of such other person appears upon the records of the town, leave a copy of the notice of such sale at the last and usual place of abode, or personally with such other person, if within this state, twenty days prior to the time of such sale.

"Sec. 13. If such other person have no last and usual place of abode within this state, then a copy of said notice shall be sent by mail to such person, at his place of residence, if known, twenty days prior to the time of such sale." . . .

"Sec. 15. The deed of any real estate, or of any interest therein, sold for the payment of taxes, made and executed by the sheriff or collector who shall sell the same, shall vest in the purchaser, subject to the right of redemption hereinafter provided, all the estate, right, and title the owner thereof had in and to such real estate at the time said tax was assessed, free from any interest or incumbrance thereon of any person to whom the notice required by the provisions of this chapter shall have been given; and the recitals in such deed shall be *prima facie* evidence of the facts stated."

As the deed from Sumner Fifield, by mortgagee, to Lyman M. Darling, dated December 9, 1876, hereinbefore referred to, of lots numbers 4, 5, 6, 7, and 8 on "Plat No. 2 of House Lots belonging to Edwin Darling, surveyed and Platted by Cushing & Dewitt, December 1870" was recorded December 16, 1876, and as Lyman M. Darling did not convey any portion of the lot in dispute until March 17, 1890, when he made the conveyance to Mary E. Darling, it is apparent that at the time the collector advertised said property for sale, Lyman M. Darling had an interest therein which appeared upon the records of the town. It does not appear, and it is not claimed, that said collector of taxes gave any notice of the proposed sale to said Lyman M. Darling, and therefore said tax deed has no binding force or effect as against the defendant. The decision of the trial justice is therefore neither against the law nor the evidence.

For the reasons aforesaid the plaintiff's exceptions are overruled, and the case is remitted to the Superior Court with direction to enter judgment for the defendant in accordance with the decision aforesaid.

Amasa M. Eaton, for plaintiff.

Bassett and Raymond, for defendant.

R. W. Richmond, of counsel.

LEWIS A. E. BLAKE vs. RHODE ISLAND COMPANY.

JANUARY 27, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *New Trial. Newly Discovered Evidence. Perjury.*

In an action of negligence, defendant petitioned for a new trial on the ground of newly discovered evidence, and in support of the motion filed affidavits covering alleged conversations with a witness, in which conversations witness admitted that he committed perjury at the trial:—

Held, that the evidence would not be admitted to impeach the verdict.

(2) *Negligence. Duty of Driver Approaching Track.*

Request to charge in these words, "It was the plaintiff's duty to look in both directions as he approached (the street), and to select such a point from which to look, as to enable him to determine whether or not a car was coming, and if the jury find that he did not so look, and that his failure so to do contributed to the collision, then he is guilty of contributory negligence, and he cannot recover."

Held, to state the law correctly, but the charge by the court, as to the duty of plaintiff, "to look and see if a car is approaching, and if there is a curve and the view is obstructed, to listen and see if a car is approaching," was sufficiently full and complete.

(3) *Charge to jury.*

When the court has correctly instructed the jury as to the law it is not required to repeat such instructions in the exact language requested by counsel.

(4) *Negligence. Common Carrier. Request to Charge.*

Request to charge, "If the jury should find that the running-board of the car was down, that fact would have no bearing upon the plaintiff's contributory negligence, if the jury also find that the car must have been in sight when he says he looked; because in such case he would have seen that the running-board was down, and would be obliged to manage his team, having such fact in mind."

Held, properly refused; because including an assumption of fact which it would have been improper to charge.

(5) *Negligence. Carriage Approaching Track.*

Charge of the court, "A person may see a car approaching, and it may be at such a distance, even although approaching at a high rate of speed, he may cross the track, and he is not guilty of negligence in doing so because a reasonable prudent man would infer that the car could not reach him at the speed at which he was driving his own conveyance before he got across, and under those circumstances he would not be guilty of negligence in entering upon the track."

Held, a correct statement of the law.

In an action for negligence arising out of a collision there was no direct testimony that the electric car could have been stopped after it was apparent to the motorman that plaintiff intended either to get on the track or so near thereto as to make a collision probable, although there was conflicting testimony as to the distance of the car from the place of the accident when the cart made the turn into the avenue, and as to its speed, and also as to what the motorman did in regard to stopping the car. The motorman also testified that he saw the cart when it had not got quite to the corner, and saw it turn the corner:—

Held, that the absence of any such direct testimony was not sufficient to justify the granting of a request to charge that there being no such evidence, plaintiff could not recover upon the ground that, notwithstanding his own negligence, the collision could have been avoided by the motorman; as such a statement would have been merely an inference of the witness from what he saw, which inference should properly and might in the case at bar have been properly inferred by the jury from the evidence.

(7) *Negligence. Damages.*

In an action for negligence, evidence showed that plaintiff received a severe and almost fatal injury to his intestines and stomach, necessitating an important operation, and requiring the wearing of a heavy belt to support the abdominal wall, leaving him in a condition where he would be unable in the future to do any heavy work. He also suffered a money loss of \$2,100:—

Held, that a verdict for \$9,082 was not excessive.

TRESPASS ON THE CASE for negligence. Heard on exceptions of both parties. Plaintiff's exception sustained. Defendant's exceptions overruled.

JOHNSON, J. This is an action of the case, brought by Lewis A. E. Blake against the Rhode Island Company, to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant company in the operation of one of its street cars.

On the 29th day of June, 1906, the plaintiff was driving an ice cart, and had just turned with said cart from Patt street into East avenue, in the city of Pawtucket, when a car of the defendant company, travelling from Providence toward Pawtucket, overtook and collided with said ice cart; and as a result of said collision the ice cart was overturned and the plaintiff was thrown to the ground and injured.

The case was tried before a justice of the Superior Court and a jury, on the 18th, 19th, 20th, and 21st days of October, 1909, and resulted in a verdict for the plaintiff for \$9,082.50. Thereafter the defendant duly filed a motion for a new trial upon the grounds:

"1. That said verdict is contrary to the evidence and the weight thereof.

"2. That said verdict is contrary to the law.

"3. That the amount of damages awarded by said verdict is excessive.

"4. That said defendant has discovered new and material evidence in said case which it had not discovered at the time of the trial thereof, and which it could not with reasonable diligence have discovered at any time previous to the trial of said case, as by affidavits to be filed in court will be fully set forth, said affidavits being made a part of this motion."

This motion was heard July 2, 1910, by the justice who presided at the trial, and July 8, 1910, a rescript was filed denying said motion on all grounds except that of excessive damages. With respect to this ground the motion was granted, unless the plaintiff should within ten days remit all of the verdict in excess of \$7,000.

The plaintiff did not file a remittitur.

Within the time, and in accordance with the procedure required by the statute, both parties presented their separate bills of exceptions and transcripts of the testimony, which were severally duly allowed by the justice presiding.

The case is now before this court on said two bills of exceptions.

The exceptions pressed by the defendant are the following, as numbered in its bill of exceptions:

"16. To the refusal of said justice, at said trial, to charge defendant's first request to charge, as appears on page 448 of said transcript, exception thereto appearing on page 449 thereof.

"17. To the refusal of said justice, at said trial, to charge defendant's fourth request, as appears on page 449 of said transcript.

"18. To the refusal of said justice, at said trial, to charge defendant's fifth request, as appears on page 449 of said transcript.

"19. To the refusal of said justice, at said trial, to charge defendant's sixth request, as appears on page 450 of said transcript.

"20. To the refusal of said justice, at said trial, to charge defendant's seventh request, as appears on page 450 of said transcript.

"21. To the refusal of said justice, at said trial, to charge defendant's eighth request, as appears on page 450 of said transcript, exceptions thereto appearing on page 451 thereof.

"22. To the decision of said court denying the defendant's motion for new trial on the ground that said verdict is contrary to the evidence and the weight thereof.

"23. To the decision of said court denying the defendant's motion for new trial on the ground that said verdict is contrary to the law.

"24. To the decision of said court denying the defendant's motion for new trial on the ground that the amount of damages awarded by said verdict is excessive.

"25. To the decision of said court denying the defendant's motion for a new trial on the ground of newly discovered evidence."

We will first consider the exceptions to the decision of the Superior Court denying the motion for a new trial on the grounds: that the verdict was contrary to the evidence, and contrary to the law, being exceptions numbered twenty-two and twenty-three. From an examination of the evidence we are satisfied that the justice presiding at the trial was correct in deciding that "the evidence was sufficiently conflicting on the three points, of defendant's negligence in operating the car at an excessive rate of speed, on the contributory negligence of the plaintiff, and as to the motorman's opportunity to stop the car after he saw or should have seen the ice cart, as to make them matters for the determination of the jury."

- (1) The twenty-fifth exception is to the decision of the court denying the defendant's motion for a new trial on the ground of newly discovered evidence. In support of the motion on this ground several affidavits were filed covering three conversations alleged to have been had with the motorman Cook on March 21, March 29, and April 1, 1910. The affiants state that in said conversations said Cook admitted that he testified falsely at the trial of the case and declared that he had lied and perjured himself on the witness stand. The case seems to come clearly within the law as laid down by this court in *Dexter v. Handy*, 13 R. I. 474. In that case the court, Durfee, C. J. (pp. 475-6), said: "The ground of the petition is that these witnesses, after the trial was over, severally admitted that their testimony was untrue. The affidavits of persons who profess to have heard these admissions are filed in support of the petition, but no affidavits are produced from the witnesses themselves either admitting that their testimony was false or stating anything differently from their testimony, while, on the contrary, one of the witnesses, and he the most important, has given an affidavit denying that he ever made the admissions. If another trial were granted, the new evidence would not be admissible in proof of the issue made by the defendant, but only to contradict or discredit the witnesses if they were again put on the stand by the plaintiff. A new trial is seldom granted for the introduction of newly discovered testimony, which goes merely to impeach the witnesses of the prevailing party. We confess that the petition does not commend itself to our minds. If the affidavits introduced by the petitioner are true, the witnesses have confessed themselves perjurers; and yet the petitioner, while he asks us to grant him a new trial on that account, has not, so far as appears, taken any steps to have them prosecuted. It has been decided that a new trial on account of perjury will not be granted until after the perjured witness either has been convicted or is dead, mere evidence of the perjury, or even an indictment for it, being deemed insufficient. *Dyche v. Patton*, 3 Jones Eq. 332; *Benfield v. Petrie*, 3 Doug. 24; *Seeley v. Mayhew*, 4 Bing. 561;

Wheatly v. Edwards, Lofft. 87. Perhaps the rule laid down in these cases may be too strict and exacting for all circumstances, but it is obviously founded in wise policy. Certainly the talk of a witness after trial ought not generally to weigh against the sworn testimony; for there would be no security for verdicts if, without peril to the witnesses, they were liable to be upset by such talk. The best evidence of perjury is the conviction of the perjurer. It is against the petition that the petitioner can find no precedent for it. There is, however, precedent against it. In *Commonwealth v. Randall*, Thacher Cr. Cas. 500, it was held that expressions used by a witness after a trial, contradicting or denying what he said in court, are not ground for setting aside the verdict and for granting a new trial, but are evidence to convict him of perjury. 'In almost every instance,' said the court, 'it would be easy for a losing party to obtain affidavits of that description.' We must, therefore, refuse a new trial on this ground." The doctrine of this case has been followed in *Roberts v. Roberts*, 19 R. I. 349; *Jones v. N. Y., N. H. & H. R. R. Co.*, 20 R. I. 214; *Timony v. Casey*, 20 R. I. 257; and *State v. Lynch*, 28 R. I. 463. In the last mentioned case, the court, Douglas, C. J. (p. 465), said: "On examination of the affidavits submitted we find that they do not divulge any evidence upon the merits of the case, but are confined to attempts to discredit the principal witness of the crime. They consist mostly of statements which this witness is said to have made contradictory of her story upon the stand. Such evidence, if well fortified, is not generally admitted to impeach a verdict, as we have frequently decided" (citing the cases *supra*).

- (2) The sixteenth exception is to the refusal of the court to charge the defendant's first request, as follows: "It was the plaintiff's duty to look in both directions as he approached East avenue and to select such a point from which to look as to enable him to determine whether or not a car was coming, and if the jury find that he did not so look and that his failure so to do contributed to the collision, then he is guilty of contributory negligence, and he cannot recover." This request appears to state the law correctly. The court had, however, covered the

matter in the general charge. Thus, on page 435 of the transcript, the court said: "So it is the law that a person in the street, in a conveyance or walking, in approaching a track is required to look and listen; to look and see if a car is approaching and if there is a curve and the view is obstructed, to listen and see if a car is approaching, and if a person fails to do it, that is negligence in law, because he hasn't done it." And further, on page 436, "Now if a person is bound to look and listen, of course, he must avail himself of what his looking and listening inform him, and he can't, after looking and seeing a car approaching, say I have looked and listened and enter on the track with a certainty he can't get across before the car which is approaching reaches that point. That is, he must avail himself of what he sees, and he is also charged with knowledge of what he might see." We think the instruction as to the duty "to look and see if a car is approaching, and if there is a curve, and the view is obstructed, to listen and see if a car is approaching," covers the ground quite as fully and completely, from a legal standpoint, as would an instruction that, "it was the plaintiff's duty to look in both directions, as he approached East avenue, and to select such a point from which to look as to enable him to determine whether or not a car was coming." When the court has correctly instructed the jury as to the law, he is not required to repeat such instructions in the exact language requested by counsel.

(3)

The seventeenth exception is to the refusal of defendant's fourth request to charge the jury as follows: "If the jury should find that the running-board of the car was down, that fact would have no bearing upon the plaintiff's contributory negligence if the jury also find that the car must have been in sight of the plaintiff when he says he looked, because in such case he would have seen that the running-board was down and would be obliged to manage his team having such fact in mind." (4)

The matter of this request had been fully covered by the charge of the court, except the assumption in the request that if the running-board was down and the plaintiff looked at the car he must have seen that the running-board was down. This

was an assumption of fact which it would not have been proper for the court to charge.

- (5) The eighteenth exception was to the refusal of defendant's fifth request to charge the jury, as follows: "If the jury find that the car was in sight of the plaintiff and approaching at a high rate of speed before the plaintiff's team had reached the track, it was the duty of the plaintiff to have stopped his horse and if the collision was brought about by his failure so to do, there can be no recovery." This request is faulty in failing to specify any distance between the plaintiff and the car as he approached the track, the only limitation as to distance being that the car was in sight. The court had covered the matters involved in the request correctly in the charge, page 436, as follows: "Now, a person may see a car approaching, and it may be at such a distance, even although approaching at a high rate of speed, he may cross the track, and he is not guilty of negligence in doing so because a reasonable, prudent man would infer that the car couldn't reach him at the speed at which he was driving his own conveyance before he got across, and under those circumstances he would not be guilty of negligence in entering upon the track."

The nineteenth exception was to the refusal of defendant's sixth request to charge, as follows: "If the jury find that the plaintiff rounded the corner of East avenue and Patt street with the car running at high speed, and but a short distance south of Patt street, in view of the small distance between the curbing on East avenue and the nearest rail, the plaintiff was not in the exercise of due care if the jury also find that in so turning a collision was rendered probable." The court had instructed the jury fully as to the duty of the plaintiff in approaching the track to look and listen; as to the question of the speed of the car, and its distance south from Patt street when the plaintiff drove out of said street and the conflicting testimony as to both these matters; as to the distance between the track and the nearest rail on East avenue; and as to the care required of the plaintiff in making the turn from Patt street into East avenue in view of the testimony as to all these

matters. The general instructions upon these matters were sufficiently full and complete, and the court was not bound to repeat such instructions in the form of this request.

The twentieth exception was to the refusal of the defendant's seventh request to charge, as follows: "If the jury find that the motorman was negligent, even grossly so, in the handling of his car, such a finding will not enable the plaintiff to recover if the jury also find that the conduct of the plaintiff was a contributing cause of the collision or that the plaintiff could have avoided the collision had he conducted himself as a reasonably prudent person would have done under the circumstances the jury find to have existed just prior to the time of the collision."

This request is entirely covered by the charge. Everything contained in it had been charged.

- (6) The twenty-first exception was to the refusal of the defendant's eighth request to charge, as follows: "As there is no evidence that the car could have been stopped after it was apparent to the motorman that the plaintiff intended either to get on the track or so near thereto as to make a collision probable, the plaintiff cannot recover upon the ground that notwithstanding his own negligence the collision could have been avoided by the motorman." It is true that no witness testified directly that the car could have been stopped after it was apparent to the motorman that the plaintiff intended either to get on the track or so near thereto as to make a collision probable. The motorman testified, as follows (p. 119): "Q. Did you see the wagon before you got to Patt Street? A. Yes, sir. Q. What was the wagon doing when you saw it? A. Coming down Patt street, near the corner. Q. Had it got to the corner when you saw it? A. Not quite. Q. Did you see it turn the corner? A. Yes, sir. Q. And when the wagon turned the corner, which direction did it take? A. Went north. Q. In what part of the street? A. The left-hand side of East avenue. Q. When the cart turned the corner and started north on the left-hand side of East avenue, how far away was your car? A. About fifty feet. Q. What speed were you going? A. About eighteen miles an hour. Q. Was

the power on or off? A. It was on. Q. When did you put the power off? A. I thought I would clear the ice wagon. Q. When did you shut the power off? A. When I hit the wagon. Q. What made you think you would clear it? A. He just got around the corner, just got straightened out. Q. Why didn't you clear it? A. The running-board was down. Q. 'On which side? A. The left hand-side." He did not testify to the distance his car was from Patt street when he first saw the wagon. He did testify, however, that he saw the wagon coming down Patt street, near the corner; that it had not quite got to the corner, and that he saw it turn the corner and go north on the left-hand side of East avenue. There was other testimony as to the distance from Patt street of the car when the ice cart made the turn into East avenue; as to the speed of the car when approaching Patt street; and also as to what the motorman did in regard to stopping the car. The testimony as to all these matters was conflicting. In our opinion the absence from the testimony of a direct statement by a witness that the motorman could have stopped the car in time to avert the collision was not sufficient to justify the granting of the request in the form in which it was presented. Such a statement would have been merely an expression of the opinion of the witness from what he saw. It is the province of the jury to draw inferences from the testimony, rather than of witnesses to draw them from what they see. We think that the jury could properly infer from the testimony that the car could have been stopped in time to avert a collision after it was apparent to the motorman that the plaintiff intended either to get on the track or so near thereto as to make a collision probable.

- (7) The defendant's twenty-fourth exception is to the decision of the trial court denying the defendant's motion for a new trial on the ground that the amount of damages awarded by the verdict is excessive. The testimony shows that the plaintiff received a severe, and almost fatal, injury. He had his ice-tongs over his shoulder when thrown to the ground, and one point of the ice-tongs penetrated his abdomen, necessitating

an operation the evening of the day the injury was received. At the operation it was found that one of the intestines had been pierced, the outer coating of the stomach injured, and a vein completely severed, and that there was a large amount of blood in the abdominal cavity. Two incisions were made in the abdomen by the surgeons, one about five and one-half inches in length and the other, at right angles to the first, about four inches in length,—the second incision being necessary in order to reach the place of hemorrhage and to enable the surgeons to scoop out the blood. At the junction of these two incisions there is, according to the medical testimony, an area, an inch to an inch and a quarter across, where the abdominal wall is thinned and is weakened. The operating surgeon testified that the rectus muscle was cut in the operation, and that such cutting weakened that muscle very much, and that although it was sewed together and healed pretty fairly well, still the muscle never would be as good as it was before. The plaintiff has to wear a heavy belt five or six inches wide to support the abdominal wall.

The testimony shows a money loss up to the time of the trial of about \$2,100, made up of: Fees for operation and etherization, \$1,100; loss of wages from accident to time of trial, \$1,000. The plaintiff has not been able to do heavy work, and was not able to do such work at the time of the trial. The medical witnesses testified that he would not be able in the future to do heavy work. According to the medical testimony this injury is permanent. The medical expert called by the defence testified that "It could not be advised that he should do heavy lifting," and in answer to the question, "Would it ever be?" answered, "Not after the reception of this injury." Also, according to the medical testimony, his incapacity to do heavy work will continue, and he will need medical attention in the future. The verdict for \$9,082.50, does not appear to us, upon the evidence, to be excessive.

The defendant's several exceptions are overruled.

The plaintiff's sole exception is to the decision of the justice presiding that the damages awarded by the jury were excessive

and that unless within ten days after the filing of said decision the plaintiff should in writing remit all of said verdict in excess of \$7,000, the defendant's motion for a new trial would be granted.

The plaintiff's exception is sustained.

The case is remitted to the Superior Court with direction to enter judgment upon the verdict.

John W. Hogan, for plaintiff.

Joseph C. Sweeney, Alonzo R. Williams, for defendant.

TOWN OF EAST GREENWICH vs. NAPOLEON GUENOND.

NAPOLEON GUENOND vs. SUPERIOR COURT.

MARCH 1, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Forcible Entry and Detainer. Bill of Exceptions.*

A bill of exceptions does not lie, in an action of forcible entry and detainer, under Gen. Laws 1909, cap. 340.

(2) *Forcible Entry and Detainer. Complaints. Delegation of Authority.*

Gen. Laws 1909, cap. 46, § 19, provides "Every suit, whether in law or equity, brought by a town, shall be brought in the name of the town, unless otherwise directed specially by law." A town council voted that the town sergeant be authorized and directed to take any and all necessary steps to eject any persons holding possession of certain real estate.

Gen. Laws 1909, cap. 340, of forcible entry and detainer, provides that "when-ever complaint shall be made in writing and under oath of the complainant or of someone in his behalf," etc., that warrant in such action shall issue, etc.,

Complaint was made in an action of forcible entry and detainer by the town sergeant, "acting for and in behalf of the town," and was signed "J. H. M., town sergeant of the town of E. G." :—

Held, that this was not a compliance with the requirements of the statute, and that the action not being brought by the proper plaintiff, the proceedings would be quashed.

Held, further, that the vote of the town council left to the uncontrolled discretion of the town sergeant to determine what steps should be taken, and was bad under that rule of law that discretionary powers granted to one person or body can not, by that person or body, be delegated to another.

Held, further that the normal action to "eject any persons holding possession," of the real estate was the action of trespass and ejectment.

(3) *Forcible Entry.*

The "*manu forti*" essential to maintain an action of forcible entry and detainer is entirely different in its legal significance from the "*vi et armis*" of the ordinary trespass.

(4) *Town Council not the town.*

The town council is not the corporation known in the law as the town.

(5) *Forcible Entry and Detainer. Payment of Jurors. Statutes.*

Gen. Laws 1909, cap. 340, § 11 of forcible entry and detainer, provides that the attendance and travel of the jurors shall be paid in the first instance by the complainant before the verdict shall be received:—

Held, that this requirement was mandatory and not directory, and, the fees of the jurors not having been paid, the court was without jurisdiction to receive the verdict.

FORCIBLE ENTRY AND DETAINER. Heard on exceptions of respondent and on petition for *certiorari*. Exceptions dismissed for lack of jurisdiction. Petition for writ granted.

BLODGETT, J. After verdict against the defendant Guenond in this action of forcible entry and detainer, he seeks to review the proceedings in the Superior Court, *first*, by a bill of exceptions and also by a petition for a writ of *certiorari*.

- (1) We are clearly of the opinion that a bill of exceptions does not lie in this proceeding under the provisions of Gen. Laws, 1909, Chap. 340, §§ 8 and 9, as follows: "SEC. 8. No appeal shall be allowed from the judgment of said court, nor shall a new trial be granted, in this proceeding, nor shall such judgment be a bar to any action thereafter brought by either party. SEC. 9. Such proceeding may be removed by *certiorari* into the supreme court, and be there quashed for irregularity, if any such there be."

The exceptions, accordingly, must be dismissed, for lack of jurisdiction in this court to entertain them.

The petition for a writ of *certiorari* relies upon several assignments of error, of which we consider the following:

"*Second*: Because said complaint is made by John H. Murray, town sergeant of the town of East Greenwich, and

alleges that the town of East Greenwich had custody and possession of the buildings and lands described in said complaint, and that the respondent, this petitioner, having made unlawful and forcible entry therein, with a strong hand did expel said town of East Greenwich from the possession thereof, and with like strong hand detains the same.

"Third: Because John H. Murray, town sergeant of the town of East Greenwich, complains that the respondent, this petitioner, having had peaceable entry into the building and lands described in the petition, the same being then and there in the possession of said town of East Greenwich, unlawfully and with force holds and detains the same (not from the petitioner, but) from said town of East Greenwich.

"Fourth: Because it does not appear that the town of East Greenwich ever made any complaint of forcible entry or forcible detainer against the respondent, this petitioner.

"Fifth: Because it does not appear that said John H. Murray was ever authorized by the town of East Greenwich to make said complaint, or that the said Murray had any lawful authority to make the same."

We are of the opinion that these are valid objections and are sufficient to defeat the action.

- (2) The language of the statute under which the action is brought is as follows: (Gen. Laws, 1909, cap. 340, § 1): "Whenever complaint shall be made in writing and under oath of the complainant, or of someone in his behalf, to a justice of the superior court, that any person has made unlawful and forcible entry into lands or tenements, and with a strong hand detains the same, or that, having lawful and peaceable entry, or peaceable entry, into lands or tenements, any person unlawfully and with force holds and detains the same, such justice shall make out his warrant under his hand and seal, directed to the sheriff of the county in which such lands or tenements lie, or to his deputy, commanding him in behalf of the state to cause to come before the superior court, at such time and place as he shall appoint within such county, twelve good

and lawful men of the same county, which warrant shall be in the following form," etc.

This doubtless requires the complaint to be verified by the oath of the complainant or by the oath of someone in behalf of the complainant, but does not change the general provisions of the law as to who shall constitute such complainant. The amended complaint reads as follows: "Now comes John H. Murray, as town sergeant of the town of East Greenwich, acting for and in behalf of said town of East Greenwich, a municipal corporation, complains," etc. . . . "Wherefore this complainant, for and in behalf of the said town of East Greenwich, prays this court to issue its warrant," etc. The complaint is signed as follows: "John H. Murray, Town Sergeant of the Town of East Greenwich." It is sought to justify this action by evidence of a vote of the town council of East Greenwich, passed September 29, 1910, as follows, viz.: "Voted: That the town sergeant be and he is hereby authorized and directed to take any and all steps necessary or essential to eject any and all persons now occupying or holding possession of that certain real estate which was conveyed by John A. Place to school district No. 2 of the town of East Greenwich, by deed dated November 18, 1857, which said deed is recorded in the town clerk's office in this town of East Greenwich in deed book, No. 16, at pages 315 and 316, and to take any and all steps necessary to put the school authorities of this town in possession of said real estate. Said town sergeant is hereby authorized to employ any necessary legal assistance that he may require in the premises."

We find no authority of law for such a substitution of one complainant for another. Gen. Laws, 1909, cap. 46, § 19, provides as follows: "Every suit, whether in law or equity, brought by a town, shall be brought in the name of the town unless otherwise directed specially by law." Clearly this is not a compliance with the requirements of the statute. Gen. Laws, 1909, cap. 357, § 9, is as follows: "Whenever any penalty or forfeiture, or any part thereof, shall be given to any town by any penal statute, the town council may sue

therefor in the name of the town, or the proper prosecuting officer in the name of any city which shall be entitled to the benefit thereof, and the town council may remit the whole of such penalty or forfeiture." But even if this action were included in the terms of that section, it would then require the action to be brought in the name of the town by the town council. Indeed, if this were an action to recover compensation for the use and occupation of the premises in question, it would hardly be contended that the proper plaintiff was before the court. In *State v. Fiske*, 9 R. I. 94, 96, it is said by Durfee, J.: "The rule is well settled, that discretionary powers which are granted to one person or body, cannot by that person or body, be delegated to another." The vote of the town council above referred to leaves to the uncontrolled discretion of Murray to determine what steps shall be taken in the premises. The normal action to "eject any and all persons now occupying or holding possession of that certain real estate," etc., is obviously the well-known action of trespass and ejectment; but here resort has been had to this extraordinary summary and statutory proceeding, which by the terms of Gen. Laws, 1909, cap. 340, § 1, *supra*, is only applicable when such a person "has made unlawful and forcible entry into lands or tenements and with a strong hand detains the same, or that having lawful and peaceable entry or peaceable entry into lands or tenements any person unlawfully and with force withholds and detains the same," etc. And the "*manu forti*" essential to maintain this proceeding is entirely different in its legal significance from the "*vi et armis*" of the ordinary trespass. *Saunders v. Robinson*, 5 Metc. 343.

- (3) But the town council is not the corporation known in the law as the town. Gen. Laws, 1909, cap. 46, § 1, is as follows: "The inhabitants of every town shall continue to be a body corporate, and may, in their corporate name, sue and be sued, prosecute and defend, in any court and elsewhere." The distinction was clearly made in *Lowber v. Mayor, etc., of New York*, 5 Abbott's Practice Reports, 325, 329: "It is an erroneous impression, although a very prevalent one, that the

members of the common council constitute the corporation. The city of New York, in the language of the Dongan charter, 'is an ancient city, and the *citizens* of the said city have anciently been a body politic and corporate;' and in the language of the Montgomerie charter, it was 'the *inhabitants and citizens* of said city,' whom the crown 'though fit' to constitute a 'body politic and corporate, by the name and style of the mayor, aldermen, and commonalty of the city of New York.' It is the 'citizens,' and not the aldermen merely and their associates, who form the corporations, and, in their aggregate character, the corporation. Aldermen, like other officers, are elected, not to supersede, but to aid the citizens, in the 'better government of the city,' and, so far as questions of property and revenue are concerned, they may be likened to directors of banking and railroad companies. They are trustees of the common fund, of which the citizens are the stockholders, or, as the law expresses it, the *cestui que trusts*." To the same effect, also, is the language of Elliott, C. J., in *city of Valparaiso et al. v. Gardner*, 97 Ind. 1-6: "An error frequently finds its way into trains of reasoning from the assumption, often made, that the officers are the corporation. This assumption is radically erroneous, for it is the inhabitants, and not the officers, who constitute the public corporations of the land."

Inasmuch as the action is not brought by the proper plaintiff, it follows that the proceedings must be quashed.

Of the remaining assignments of error, we consider only one, which, as a question of practice, may be of importance to the members of the bar.

The fifteenth assignment of error is as follows: "Because the Court received and recorded the verdict of the jury before the complainant or anyone in his behalf paid the attendance and travel of the jury in accordance with the provisions of section 11 of chapter 340 of the General Laws of 1909."

Section 11 of said chapter 340 is as follows: "Every person summoned and attending as a juror shall be entitled to the same allowance per day for his attendance and for travel per

mile as for like attendance and travel in the superior court; to be paid in the first instance by the complainant before the verdict shall be received, and to be taxed in the bill of costs against the defendant, if the verdict be against him."

The record shows that the verdict was returned and received by the court on November 14, 1910, and that the amount due for travel and attendance of the jurors was not then paid, though paid on a subsequent day.

In *Levy v. David*, 24 R. I. 249, it was said by Stiness, C. J., of the action of forcible entry and detainer: "Although this is an ancient remedy, it is based upon considerations of public policy rather than upon settlement of individual rights, and is of statutory rather than of common law authority. Rules of construction are therefore largely dependent upon the terms of the statutes, which vary in details. There is, however, a general agreement in holding that the remedy is of such a summary character as to require a complainant to bring himself strictly within statutory provisions."

We therefore hold that the foregoing requirement is mandatory and not directory merely. The jurors in a case of forcible entry and detainer are not entitled to be paid their fees for travel and attendance out of the State treasury as in other civil and criminal cases, and hence the statute requires payment by the complainant in the first instance and before the verdict is received. The jurors are required to attend at the command of the state and to leave their homes and their business for that purpose, and, being so obligated, it is the evident policy of the law that the complainant who invokes this extraordinary and summary proceeding shall not be permitted to withhold their compensation in the event of an adverse verdict. Clearly, if the jurors' fees were never paid, the court would have no jurisdiction to enter judgment upon such a verdict. We see no reason for departing from the requirement of the letter of the statute, since in that way only can it be made effective, inasmuch as if payment may be delayed at all it may be delayed without limit. The court therefore was without jurisdiction to receive the verdict in question on said November 14, 1910.

The exceptions in said cause are dismissed for lack of jurisdiction in this court to entertain the same.

The petition for a writ of *certiorari* is granted, and, inasmuch as the whole record has been sent up to this court with the proceedings relative to the bill of exceptions, and all the questions raised in each proceeding have been fully argued, the case is treated as though the writ had issued and the record of the proceedings will be quashed.

Quinn and Kernan, for town of East Greenwich.

Samuel W. K. Allen, for Napoleon Guenond.

NEWPORT TRUST COMPANY vs. JOHN A. VAN RENSSELAER, *et al.*

MARCH 6, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Trusts. Dividends. Life tenant and Remainderman.*

An extra dividend of fifty per cent. was declared by a corporation on its capital stock, and the stockholders were invited to subscribe to the capital stock of a subsidiary company, in which event one-half the dividend would be paid for such subscription and the other half would be paid in cash to the stockholder.

A trustee took the new stock and received the other half in cash. Upon the question as to whether such cash dividend should be paid over to the life tenant as income or added to the principal of the fund:—

Held, that, there being nothing to show that it was not a dividend of profits earned in the regular course of business, and during the term of the life estate, it came within the general rule that cash dividends go to the life tenant.

(2) *Same.*

As a general rule cash dividends go to the life tenant, and stock dividends to the remainderman.

BILL IN EQUITY. Certified to Supreme Court.

PARKHURST, J. This is a bill in equity brought by the Newport Trust Company, as trustee under the will of Frances M. Hoyt, deceased, to determine whether certain money should be paid to the life-tenant or remainderman, and is certified to

the Supreme Court, on the ground that it involves the construction of a will and is ready for final decree.

The will of Frances M. Hoyt, which was probated December 4, 1905, at Newport, R. I., provided as follows:

"Whereas there are certain securities belonging to me now in the hands of William A. Duer the income from which he has collected and paid over to Mrs. John K. Van Rensselaer, I do hereby bequeath the said securities to said William A. Duer, in trust, with full power to continue or change the investments from time to time and to pay the net income therefrom to Mrs. John K. Van Rensselaer for and during her life, and upon her death to pay over the principal of said trust fund to her son John A. Van Rensselaer, absolutely free and clear of any trust."

William A. Duer, predeceased testator, and the Newport Trust Company was by a decree of the Superior Court, entered April 9th, 1906, appointed trustee in his stead. Part of the trust has consisted of 100 shares of the Delaware Lackawanna & Western Railroad Company. That company, in order to comply with a decision of the United States Supreme Court under the provisions of the "Hepburn Act," was instrumental in organizing a coal company, and declared a dividend of fifty per cent. on the capital stock payable July 20, 1909, to stockholders of record on July 1st, 1909, as appears by the following circular:

"To the Stockholders of the

"Delaware, Lackawanna and Western Railroad Company.

"An extra dividend of fifty per cent. has been declared by the Board of Managers on the capital stock of the company, payable on July 20th, 1909, to stockholders of record at the close of business on July 1st, 1909.

"In conformance with the decision recently rendered by the United States Supreme Court, declaring that this Company cannot lawfully transport in interstate commerce coal owned by it, a coal selling company has been organized under the Laws of the State of New Jersey, under the name of the Delaware, Lackawanna & Western Coal Company, the capital stock

of which will be \$6,800,000.00, divided into 136,000 shares of \$50.00 each par value.

"It is proposed that the Delaware, Lackawanna & Western Railroad Company, as the Seller, shall contract with said Coal Company as the Buyer, to sell and deliver the coal mined and purchased by the Railroad Company to the Coal Company at the mines.

"The stockholders of the Railroad Company are hereby invited to subscribe to the capital stock of the Coal Company at the rate of one share of the latter for each four shares of the capital stock of the Railroad Company held by the several stockholders as shown by the books of the Company at the close of business July 1st, 1909.

"As it is deemed undesirable to issue part shares as scrip, or otherwise, any stockholder whose pro rata Coal Company subscription may entitle him to a part share, may, on payment in cash of the additional amount necessary, acquire a full share instead of the part share allotted to him.

"Herewith subscription blank which each stockholder should sign and have duly witnessed in the event he desires to subscribe for the stock of the Coal Company on the basis set forth herein. Such blank contains an order on the Treasurer of the Company authorizing and directing that one-half of the dividend of fifty per cent. due and payable on July 20th, 1909, be paid to the Coal Company in satisfaction of the subscription of such stockholder to the capital stock of the Coal company. The other half of such dividend will, of course, be paid in cash. Certificate for the number of shares of stock so paid will be issued in the name of and delivered to the stockholders as the latter may direct.

"It is urged by the Company's legal advisors that the proposed selling contract be made operative as early as possible.

"It is therefore respectfully requested that the stockholders of the Company take prompt action on the several matters submitted to them hereby."

The trustee took half the dividend in stock in the new company, and elected to take the other half in cash. The cash

amounted to \$1,250, and the question is whether this latter sum should be paid over to the life tenant as income, or added to the principal of the fund. The beneficiary for life, Mrs. John K. Van Rensselaer, contends that it should be paid to her.

- (1) By the circular above quoted, it appears that the dividend declared is on the capital stock, and that at least 25 per cent. was to be paid in cash and the whole might be; that it is clearly optional with the stockholders to take the whole dividend in cash, or to take one-half in cash, and subscribe the other one-half for the stock in the new coal company, as they see fit; that the stockholders were not obliged to subscribe for the stock in the new company; that the first half of the dividend was paid to the complainant in cash, and is now held by it and is the fund in dispute in this cause.

Although the dividend here in question is called an "extra" dividend, there is nothing to show that it was not a dividend of profits earned in the regular course of business, and during the term of the life-estate, and we find nothing in the facts appearing in this case to take it out of the general rule that cash dividends go to life tenant. This rule is set forth in 2d Thompson on Corporations, 1st ed., section 2201, as follows: "Keeping in mind the foregoing principles there is a strong presumption that cash dividends, declared while the corporation is a going concern are dividends of profits or earnings merely; for a corporation has no power to declare a dividend of its capital except in liquidation, or to reduce the capital where it is authorized to do so by its governing statute. There is no difficulty in holding, then, that an ordinary cash dividend of a going corporation, goes to the life tenant, and not to the remainderman, if he is the beneficial holder of the stock at the time it is declared." And further, the author quotes Mr. Justice Peters, in *Richardson v. Richardson*, 75 Me. 570, in part, as follows (p. 574): "But we are well convinced that the general rule, deducible from the latest and wisest decisions, declares all money dividends to be profits and income belonging to the tenant for life, including not only the usual annual dividend but all extra dividends or bonuses payable in cash from the earnings of the

Company." . . . "We think the true rule to be that when a dividend upon its stock is declared by a corporation, it belongs to the person holding the stock at the time of the declaration, whether the holder be a life tenant, or remainderman without regard to the source from which or the time during which the profits and earnings divided were acquired by the Company." And see *Reed v. Head*, 6 Allen, 174; *Simpson v. Moore*, 30 Barbour, 637. So says Taylor on Private Corporations, section 799: "There is little doubt that a reasonable amount of profit earned before the testator's death but declared in the shape of an ordinary cash dividend after that event, is income and belongs to the life tenant." See also, Cook on Stock and Stockholders, § 552; *Bates v. MacKinley*, 31 Beav. 280; *Millen v. Guerrard*, 67 Ga. 284.

A case not unlike the present in principle, is *Davis v. Jackson*, 152 Mass. 58. There the stockholders voted to increase the capital stock by 1,000 shares, and the stockholders were invited to subscribe in proportion to their shares if they paid within thirty days. The directors at the same time, voted to declare a dividend of \$25 a share. This was exactly what was required to enable the stockholders to subscribe for the new stock if they so desired. They were not bound, however, to subscribe. The earnings of the corporation were sufficient to pay the dividends, but if used for that purpose it would be necessary to raise money to pay for additions which had been made to the capital. Held: that the transaction was a cash dividend and passed to the life tenant as income. Said the court (p. 59): "The argument for the remainderman is, that the transactions of the company, viewed as a whole, are in substance a stock dividend. It is tacitly assumed that the company had appropriated its earnings to the improvements which the stock represented before the dividend was declared, and then the conclusion is drawn that the dividend represented these improvements. But in the opinion of a majority of the court, it is evident that, if we look at either extreme of the facts, the life tenants ought to prevail. The dividend was declared as a cash dividend, and it represented what originally at least

were earnings of the company." . . . "If the plaintiff trustees had seen fit to keep the money and to sell their rights, they could have done so, and neither the corporation nor the *cestuis que trust* could have complained. Of course, the trustees could not affect the respective rights of the defendants by their determination. If they had kept the dividend it would have been a bold claim on the part of the remaindermen that it was theirs because the corporation was in debt for additions to capital." . . . "A dividend of cash representing profits is none the less to be taken as income, because the stockholder is at liberty to invest it at par in stock which is worth more than par, if he is also at liberty to sell the right to subscribe for the stock." See also 2d Thompson on Corporations, 1st ed., section 2208; *Minot v. Paine*, 99 Mass. 101; *Adams v. Adams*, 139 Mass. 449.

There is no decision in Rhode Island on the exact point in issue, but the several cases, while they decide in favor of the remainderman in the particular case, nevertheless recognize the principles stated above. In *Parker v. Mason*, 8 R. I. 427, the bank was authorized by an act of the General Assembly to reduce the par value of its capital stock, because of certain supposed losses. When the supposed losses were recovered the bank issued additional stock to its shareholders. It was held that under the provisions of the will, this new stock did not pass to the life tenant as "income, profits and interest," but that the new shares simply took the place of the property for which they were issued.

In *Brown and Larned, Petitioners*, 14 R. I. 371, the syllabus of the case recites: "New shares of stock in a corporation representing its surplus property and distributed to its stockholders are not considered as income and do not belong to life tenant." Said the court, on page 372: "The surplus property of the corporation, which is represented by such stock, is still retained by the corporation and managed and applied in the prosecution of the business."

A similar case was *Greene v. Smith*, 17 R. I. 28, where the corporation voted to increase its stock, and offered the new

shares, which were at a premium, to the stockholders at par, at the rate of one new to every six shares belonging to them. Held: that the new shares did not belong to the life tenant as income, but were part of the principal.

- (2) These cases are entirely consistent with the principles above set forth; namely, that cash dividends go to the life tenant and stock dividends go to the remainderman.

In accordance with the authorities cited above, this court holds that the amount of \$1,250 received by the trustee, complainant, is a cash dividend, and is income which belongs to the life tenant, Mrs. John K. Van Rensselaer, and is to be paid to her.

The parties may submit a decree, in accordance herewith, for the approval of the court.

Sheffield, Levy and Harvey, William Paine Sheffield, for complainant.

Max Levy, William R. Harvey, for respondent.

BRIDGET McMAHON, Admx., vs. THE RHODE ISLAND COMPANY.

MARCH 6, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Evidence. Objection to Testimony.*

After a question asked by plaintiff had been answered, defendant objected, and objection was sustained. On exception by plaintiff:—

Held, that, in the absence of a motion to strike out, or a caution to the jury to disregard it, it was fair to assume that the jury finding for plaintiff, considered this testimony with the other evidence, and that the trial court also considered it in coming to its conclusion upon all the evidence, and that plaintiff was not prejudiced by the ruling sustaining the exception.

(2) *Rules Governing Granting of New Trials in Appellate and Trial Courts.*

The rule established in the State before the creation of the Superior Court, that to justify the grant of a new trial, on the ground that the verdict was against the evidence and the weight thereof, it should appear that the evidence *very strongly* preponderated against the verdict, was the rule governing the court of last resort and not the trial court.

A trial court properly granted a motion for a new trial where, in the judg-

ment of the court, the evidence was *fairly preponderant* in showing that plaintiff's intestate was guilty of contributory negligence.

A trial court ought to grant new trials, whenever its judgment shows that the verdict fails to administer substantial justice, or whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy. *Wilcox v. R. I. Co.*, 29 R. I. 292, and *Nolan v. R. I. Co.*, 30 R. I. 246, reaffirmed.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff, and overruled.

PARKHURST, J. This is an action of the case for negligence resulting in the death of the plaintiff's intestate, who was injured in a collision with a train of the defendant's cars, on Dyer street, in the city of Providence, March 10, 1910, opposite the scales and yard of the Eastern Coal Company, from which the plaintiff's intestate was driving out with a large coal wagon drawn by a pair of horses.

The jury returned a verdict for the plaintiff for \$5,000.

The defendant filed its motion for a new trial upon the usual grounds, viz.: (1) verdict contrary to evidence; (2) verdict contrary to law; (3) damages excessive; (4) newly discovered evidence. Upon hearing of said motion the justice who presided at the trial granted the defendant's motion for a new trial on the ground that the deceased was guilty of contributory negligence. The trial court, upon the argument and consideration of the defendant's motion for a new trial, had before it a full transcript of all the evidence; and in its rescript makes a searching analysis of the testimony; and while it says, in discussing the manner of the defendant in running its cars, "I am not prepared to say that the defendant was not negligent in so doing;" yet upon a very careful review of all the testimony the court reaches the following conclusion: "Apparently McMahon, while seeing the danger, thought by whipping up he could get by and took the chance of so doing, and thus met the accident. In my judgment the evidence as to the manner of the collision is fairly preponderant in showing that the deceased, in attempting to cross as he did in front of the train, was guilty of contributory negligence. And if the defendant's negligence consisted in operating the train practically with-

out control, there was no opportunity on its part, under the doctrine of the last clear chance, to avoid the collision when McMahon whipped up and drove on. The motion for a new trial is therefore granted."

The plaintiff thereafter duly filed and prosecuted her bill of exceptions to this court, alleging four exceptions, of which at the argument in this court she only relies upon the first and fourth, which are as follows, viz.:

"1. To the ruling of the court excluding certain testimony as appears in the transcript of testimony filed herewith at page 11 thereof."

"4. To the decision of said court granting the defendant's motion for a new trial," etc.

- The first exception was noted to the ruling of the court sustaining an objection to a question which had been answered as shown by the testimony on page 11, as follows: "Q. 86.
- (1) As an experienced driver, when Mr. McMahon drove out there on to that track the distance he had to go, and looking down and seeing that train where you saw it just starting up, going slower than he was, was there room enough in space to get across if they didn't increase the speed? A. Yes, sir. Objected to by Mr. Whipple; objection sustained. Exception taken by Mr. Hogan."

We do not see how this exception can avail the plaintiff. The question had already been answered before objection was taken, and the testimony was before the jury. There was no motion to strike it out nor was the jury cautioned not to consider it in coming to their verdict. It is fair to assume that, as the jury found for the plaintiff, they did consider this testimony with the other evidence in the case; nor can it be assumed that the trial court in its consideration of all the evidence before it, in the motion for new trial, did not, upon mature deliberation, consider this evidence also as admissible and weigh it with all the other evidence in coming to its conclusion as to the contributory negligence of the plaintiff's intestate. Upon the record, as it stands, we do not see that the plaintiff was pre-

judged by this ruling of the court, and this exception is therefore overruled.

- (2) The fourth exception relates to the action of the court in setting aside the verdict and granting the defendant's motion for a new trial solely upon the ground of the contributory negligence of the plaintiff's intestate. The plaintiff's counsel argues with much emphasis that, as the jury found for the plaintiff, and as the question of the plaintiff's contributory negligence upon all the evidence was a question solely for the jury and was properly left to them, the court below was in error in setting aside the verdict, on the ground that "the evidence as to the manner of the collision is fairly preponderant in showing that the deceased, in attempting to cross as he did in front of the train, was guilty of contributory negligence." Counsel takes the position that the court below in finding only that the evidence is "*fairly preponderant*" states himself outside the rule long established by this court, as well as by all other courts of last resort, that to justify the grant of a new trial on the ground that the verdict is against the evidence and the weight thereof, it should appear that the evidence *very strongly* preponderates against the verdict, and cites, *Boss v. Prov. & Worcester R. R. Co.*, 15 R. I. 155, 156; *Johnson v. Blanchard*, 5 R. I. 24, 25; *Patton v. Hughesdale Co.*, 11 R. I. 188; *Sweet v. Wood*, 18 R. I. 387, 389; *Watson v. Tripp*, 11 R. I. 98, 103; *Lebeau v. Dyerville Mfg. Co.*, 26 R. I. 36; *Hehir v. Rhode Island Co.*, 26 R. I. 31. We have no doubt whatever that the rule, recognized and established in these cases, is the true rule when applied, as it is therein applied, to the powers of a court of last resort, where only the written transcript of the evidence is before the court. But the plaintiff's counsel fails to distinguish between the proper exercise of the powers of a court of last resort in granting new trials, and the proper function of the trial court in granting new trials when the trial judge has had the advantage of seeing and hearing all the witnesses before the jury. The cases above cited were all decided before the change in our judicial system and before the creation of the present Superior Court. At that time motions

or petitions for new trial on the ground that the verdict was against the evidence, came at once to the Supreme Court, or later to the Appellate Division of the Supreme Court, upon the written transcript of the evidence, and not before the trial court, where the judge as well as the jury saw all the witnesses and heard all the evidence. And so the rule set forth in the cases cited was the rule governing the court of last resort, and not the rule governing the trial court. When, under the Court and Practice Act, in 1905, the Superior Court came into existence, jurisdiction was given to the judge who tried the case with a jury to grant new trials, on the ground that the verdict was against the weight of the evidence, and thereafter, as occasion arose, this court set forth the difference between the rules respectively governing the Superior Court and this court in the granting of new trials. This distinction is clearly pointed out in the case of *Wilcox v. Rhode Island Co.*, 29 R. I. 292, wherein this court cited with approval the language of the opinion in *Dewey v. Chicago, etc., Ry. Co.* 31 Iowa, 373, in which the court pointed out in the clearest language the different rules as to granting new trials, which are applied respectively in courts of last resort, where the case is heard only on the written transcript, and in the trial court, where the judge has had the advantage of seeing and hearing the witnesses; and the language of the opinion in speaking of the duty of the trial court, which we wish to emphasize, is as follows: "Those courts ought to independently exercise their power to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury have from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty, and the verdict ought to be set aside and a new trial granted."

And again, in *Noland v. Rhode Island Co.*, 30 R. I. 246, this court applied the same rule, in a case where the trial judge

had disapproved the verdict of the jury and granted a new trial, saying: "Moreover, when the verdict of a jury has been disapproved by the judge who presided at the trial, and a motion for new trial has been granted by him on the ground that the verdict fails to administer substantial justice, such exercise of his power will not be disturbed by this court unless it clearly appears that such conclusion of the trial judge is erroneous."

The same principles were also most clearly set forth by Brewer, J. (late of the U. S. Supreme Court), in the case of *Kansas Pac. R. Co. v. Kunkel*, 17 Kas. 172, where he goes into a most elaborate discussion of the authorities, regarding the same questions; and in speaking of the powers of the trial court, as distinguished from those of the court of last resort, uses the following language (p. 172): "The functions of the two are widely dissimilar. The one has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and if it appears to him that the jury have found against the weight of the evidence it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when *his judgment* tells him that it is wrong, that whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury."

It will be noted, that in this last quotation Judge Brewer uses the words "*fair preponderance*" which are almost the same words and with exactly the same meaning as the words used by the trial judge in this case in speaking of the evidence

showing contributory negligence. These words are most commonly used by judges in instructing juries as to the rules relating to the burden of proof; and, far from being subject to the criticism of plaintiff's counsel to the general effect that they express doubt or hesitation on the part of the judge in his estimate of the weight of the evidence, we find that they are intended to express, and do express in a conservative way, his dissatisfaction with the verdict and his conviction that "it fails to administer substantial justice." (*Noland v. R. I. Co. supra*).

If the judge, who tried the case below, having thus expressed his dissatisfaction with the verdict, had nevertheless refused to grant a new trial, he would have failed to do his duty and would have committed reversible error, as has been held in several cases. Thus, in *Clark v. Great Northern Ry. Co.*, (1905) 37 Wash. 537, the court says (p. 540): "In passing upon the motion for a new trial, the court below used the following language: 'I am compelled, though reluctantly, to deny the motion for a new trial in this case. My reluctance arises from the fact that, in my opinion, the weight of the evidence did not sustain the contention that excessive force was used in ejecting plaintiff from the train; but that issue was submitted to the jury, and was decided in favor of the plaintiff, and as, under our judicial system, the trial judge in a civil jury case has little more power or authority than a 'mentor at a town meeting,' I am not at liberty to disturb the jury's finding on that issue.'

"It appears from the foregoing statement that the trial court labored under an entire misapprehension as to its powers and its duties. Our statute provides that a new trial may be granted, among other grounds, for insufficiency of the evidence to justify the verdict; and this power must be exercised by the trial courts, if at all. These courts should take due care not to invade the legitimate province of the jury, but if, after giving full consideration to the testimony in the light of the verdict, the trial judge is still satisfied that the verdict is against the weight of the evidence, and that substantial justice has not

been done between the parties, it is his duty to set the verdict aside."

The court then cites and reviews numerous cases in support of its position, including that of *Dewey v. Chicago, etc., R. R. Co.*, 31 Iowa, 373, cited in *Wilcox v. R. I. Co.*, 29 R. I. 292, 295, and for the error in denying the motion for a new trial, reverses the judgment and grants a new trial. See also 3 Graham and Waterman on New Trials, p. 1207. *Clark v. Great Northern R. Co.*, 2 Amer. & Eng. Ann. cas. 760, and cas. cit. and note.

We have thought it necessary thus to review, at some length, the position heretofore taken by this court in the cases of *Wilcox v. Rhode Island Co. supra*, and *Noland v. Rhode Island Co. supra*, because of the very strenuous argument of counsel for the plaintiff at the hearing that the trial judge in his rescript in this case had violated the rule laid down in a long line of decisions by this court, and because of the manifest misapprehension of counsel as to the application of the rules relating to the granting of new trials in the Superior Court and in this court, and their differences, as formerly set forth in the *Wilcox* and *Noland* cases, which are hereby reaffirmed.

Upon a careful review of the testimony in this case we do not find that the judge of the Superior Court committed any error in granting the defendant's motion for a new trial, and the plaintiff's fourth exception is therefore overruled.

The case is remitted to the Superior Court for a new trial in accordance with the order of that court heretofore made.

John W. Hogan, for plaintiff.

Joseph C. Sweeney, Clifford Whipple, for defendant.

ANDREW J. BARBOUR vs. J. KISE HALL.

MARCH 13, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Appeal and Error. Power of Trial Justice to Grant New Trial. Review by Supreme Court.*

As the justice presiding at a jury trial may freely and independently exercise his power to grant a new trial whenever in his judgment the verdict fails to administer substantial justice, such disapproval of a verdict by him will be maintained by the appellate court, unless it appears clearly that his conclusion was erroneous.

ASSUMPSIT. Heard on exceptions of plaintiff and overruled.

PER CURIAM. The parties entered into a written contract wherein the plaintiff agreed to build a house for the defendant. The plaintiff asserts and the defendant denies that the original contract was abandoned and a new contract entered into by the parties whereunder the house was completed. The plaintiff claimed that a balance of over twelve hundred dollars with interest was due him under the new contract. The defendant admitted that he owed the plaintiff about one hundred and sixty dollars. The jury found for the plaintiff and assessed his damages at \$1,306.13.

The defendant filed his motion for a new trial upon the ground that the damages awarded were excessive.

The justice of the superior court who presided at the trial was of the opinion "that the evidence clearly does not preponderate in favor of the plaintiff's claim that the original contract was abandoned and the new one entered into," and concerning the damages, he used the following language: "I have reached the conclusion that the verdict should not stand for a larger amount than \$465. Unless, therefore, the plaintiff shall within ten days after the filing hereof, in writing, remit all of the verdict in excess of \$465, the defendant's motion for a new trial will be granted."

The plaintiff did not embrace the opportunity thus afforded

him, but took an exception to the said ruling of the superior court, and the case is before this court upon the plaintiff's bill of exceptions.

We have had occasion to refer to the rules that govern the *nisi prius* courts in the consideration of a motion for a new trial,—See *Wilcox v. R. I. Co.*, 29 R. I. 292; *Noland v. R. I. Co.*, 30 R. I. 246, and *McMahon v. R. I. Co.*, 32 R. I. 237.

For the attainment of the highest degree of efficiency in the administration of justice it is absolutely necessary for the justices who preside over jury trials to freely and independently exercise their power to grant new trials "whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice in the case." And whenever the verdict of a jury has been so disapproved by the judge, such exercise of his power will be maintained by this court unless it clearly appears that his conclusion is erroneous. No such error is apparent in this case.

The plaintiff's exception is therefore overruled and the case is remitted to the Superior Court for a new trial.

Charles H. McKenna, for plaintiff.

Seeber Edwards, Edwards & Angell, for defendant.

HUMES CONSTRUCTION CO. vs PHILADELPHIA CASUALTY CO.

MARCH 10, 1911.

PRESENT: Dubois, C. J. Blodgett, Johnson, Parkhurst and Sweetland, JJ.

(1) *Liability Insurance.*

While a policy of employer's liability insurance was in effect between the parties, wherein defendant agreed to indemnify plaintiff for accidental injuries suffered by its employees, whose compensation was given in a certain schedule at any of the places mentioned in said schedule, a workman on a building, which plaintiff was constructing, was injured. Plaintiff gave defendant the required notice and after suit against plaintiff, defendant investigated the accident and considered the question whether the workman was an employee, and thereafter without reservation assumed conduct of the defence. After verdict approved by the appellate court, the court decided that the workman was not an employee of plaintiff. Defendant refused to

reimburse plaintiff for the amount of the judgment on the ground that the judgment was not covered by the policy.

One of the counts of the declaration, set out the terms of the policy, but did not allege that the workman was an employee and alleged that because of the assumption of the defence by defendant with full knowledge of the facts, it waived all right of objection that the claim was not covered by the policy:—

Held, that after plaintiff turned over to defendant, as a result of its conduct the complete control of the suit, defendant could not say that plaintiff was not injured thereby or that the result would have been the same if plaintiff had taken charge of the matter itself.

(2) *Waiver. Estoppel.*

Held, further that plaintiff was not restricted by the use of the word "waiver" in its count, to a recovery only in accordance with the doctrine of waiver. For if the facts show a cause of action the count should be sustained, whether the right arises from waiver, estoppel or any other established doctrine of law.

(3) *Quasi Estoppel.*

Held, further, that while with exactness the conduct of defendant was an estoppel to deny liability rather than a waiver of a right, yet its liability was based on the broad equitable principle that a person with full knowledge of the facts should not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.

There is a distinction between *quasi* estoppel and estoppel by misrepresentation. The former includes the doctrine of election, the principle which precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver.

Held, further that the doctrine of *quasi* estoppel was broad enough to extend the liability of the defendant beyond the terms of the policy and to furnish indemnity for loss to a person not an employee.

ASSUMPSIT. Heard on exceptions of defendant and overruled.

SWEETLAND, J. This is an action of the case in assumpsit based on an employer's liability insurance policy issued by the defendant to the plaintiff. The amended declaration contains three counts, together with the common counts.

On October 23, 1906, the defendant company which was engaged in the business of furnishing employers' liability insurance issued to the plaintiff corporation, then doing business under the name of Humes, Cruise & Smiley Co., a policy of insurance, whereby the defendant agreed to indemnify the plaintiff for one year against loss from liability imposed by

law upon the assured for damages arising solely from injuries caused by any accident and suffered by any employee, whose compensation was given in a certain schedule, at any of the places mentioned in said schedule, and also to undertake at its own cost the settlement of any claim and the defense of any suit arising from such injuries. The policy also provides that the assured shall give immediate notice to the defendant of any such accident and of any claim made as a result of it; that in case of suit being brought, all papers and information relating to it shall be given to the defendant and thereupon the defendant company "shall at its own cost, undertake on behalf of and in the name of assured, the settlement of such claim or the defense of such suit, or the prosecution of any appeal deemed advisable by the Company," and that the assured "shall not without the written consent of the Company interfere in any negotiation for settlement nor in any legal proceedings, nor incur any expenses other than for imperative surgical relief at the time of the accident."

On December 7, 1906, while this policy of insurance was in force, one Dennis A. Driscoll was injured while working on a building which the plaintiff was constructing at North Attleboro, the same being one of the places mentioned in said schedule. It appears from the testimony that Driscoll was one of seven plasterers furnished by a Mr. Cunningham to the plaintiff with the understanding that the latter should take full charge of them and pay their wages, and that Mr. Cunningham should receive fifty cents a day for the use of these men. The plaintiff paid the wages of these men, including Driscoll's, furnished them material with which to work, and through its foreman gave orders to them as to their work. The wages of Driscoll were included in the pay-roll, on the basis of which the annual premium on this policy was computed and paid. The plaintiff gave the defendant notice of the accident, and of the claim of Driscoll against the plaintiff, and of the suit subsequently brought by Driscoll against the plaintiff in the Superior Court. After Driscoll commenced suit the defendant in the case at bar investigated the accident and con-

sidered the question as to whether Driscoll was an employee of this plaintiff and was working as such at the time of the accident. After such consideration this defendant, through its attorneys, without reservation, assumed the entire conduct of the defence of the Driscoll suit in all proceedings in the Superior Court, and before this court upon exceptions. In the Superior Court the jury returned a verdict for the plaintiff Driscoll in the sum of \$1,600, which verdict was approved by this court upon exceptions. In the determination of the exceptions in the suit of Driscoll against the plaintiff in the suit at bar, this court considered whether Driscoll was a fellow servant of certain employees of this plaintiff and decided that Driscoll was not an employee of this plaintiff. Upon execution this plaintiff was compelled to pay the judgment against it in the Driscoll suit. The defendant refused to reimburse the plaintiff for the amount paid upon the Driscoll judgment, on the ground that such judgment was not covered by the said policy of indemnity issued by the defendant to the plaintiff. This suit is brought on said policy for reimbursement and indemnity.

- Jury trial was waived in the case at bar and it was tried before a justice of the Superior Court. Decision was rendered for the plaintiff for the full amount of its claim. The case is before this court upon exceptions to the ruling of the Superior Court upon a demurrer to the third count of the amended declaration, to the ruling of the Superior Court at the trial excluding certain testimony offered by the defendant and to the final decision of the Superior Court in favor of the plaintiff.
- (1)

The third count of the amended declaration in this case, after setting out the terms of the policy upon which suit is brought, alleges the accident to Driscoll, but does not allege that Driscoll was an employee of the plaintiff at the time of the accident. Said third count further alleges that the defendant was notified of the accident and of the commencement of the Driscoll suit and "that the defendant corporation, with full knowledge of the facts of said case, and especially of the facts relating to the employment and work of the said Dennis A. Driscoll,

and without any protest or reservation whatsoever, and in accordance with the provisions of said policy, undertook the defense of said legal proceedings in the name and in behalf of the said plaintiff corporation;" and further, "That because and by reason of the defendant's assuming full control of the defense in the said action brought by the said Dennis A. Driscoll against the present plaintiff corporation as aforesaid, with full knowledge of the facts and without protest or reservation of any kind whatsoever, the defendant corporation waived any and all right of objection that said claim and action was not covered by the said policy and the said defendant corporation should not now be permitted to disclaim liability under the aforesaid policy of insurance because the said Dennis A. Driscoll, at the time of the aforesaid accident, was not an employee of the plaintiff corporation, or because of any other reason whatsoever."

The defendant demurred to said third count on several grounds, all based upon the fact that it does not appear by the count that Driscoll was at the time of the accident an employee of the plaintiff corporation or that Driscoll's claim was covered by said policy.

By the allegations of said third count the relation of this plaintiff and defendant with regard to the Driscoll suit arose entirely from said policy of indemnity. The defendant's obligation under said policy was to indemnify the plaintiff against loss from liability imposed by law upon it for damages arising from injuries caused by accidents to its employees. When the said Driscoll was injured the defendant was notified of that fact and later of his suit against the plaintiff. The question then arose and was considered by these parties, whether Driscoll was or was not an employee of the plaintiff. All the facts as to the employment and work of Driscoll at the time of the accident to him were fully disclosed to the defendant. If the defendant was then in doubt as to its liability to indemnify the plaintiff for loss arising from the Driscoll suit, it might have taken the position that Driscoll was not an employee of the plaintiff, have refused to assume the defence of his suit

against this plaintiff and have awaited the result; thus leaving the plaintiff free to defend the suit in its own way through its own attorney or to compromise the same, as it might desire or might be able; or the defendant might have endeavored, by some agreement with the plaintiff, to have been permitted to assume the conduct of the defence of said suit on condition that it should not thereby be considered to have enlarged its obligation or liability under the policy, in the event of a final decision that Driscoll was not an employee of the plaintiff. The defendant, however, without reservation, and with an apparent admission of liability in the premises, did take upon itself in behalf of this plaintiff the conduct of the defence of said suit, both in the Superior Court and before this court, upon exceptions. When it was finally decided in this court that Driscoll was not an employee of the plaintiff, the defendant for the first time claimed that it was not liable to indemnify the plaintiff for its loss in consequence of the injuries to Driscoll. With the possibility that it might be liable to the plaintiff under the policy, the defendant, for its own purposes, desired to have complete control of the defence in the Driscoll suit. Because of the apparent admission of liability arising from the defendant's conduct, the plaintiff turned over to it such complete control of the plaintiff's interests in said suit, thus depriving itself of any advantage that might arise from a conduct of the matter by its own attorneys in its own way. The defendant cannot be permitted now to say that the plaintiff was not injured thereby, or that the travel and the result of the proceeding would have been the same if the plaintiff had taken charge of the matter for itself. Such claims are based entirely upon conjecture.

- The law will not allow the defendant, without rendering itself liable to the plaintiff, to assume these inconsistent positions to the disadvantage of the plaintiff. Counsel for the defendant has argued that in the state of the declaration the plaintiff should not be permitted to recover under the third
- (2) count unless it can do so in accordance with the doctrine of waiver; because the plaintiff has charged in said count that

the defendant by its action in the Driscoll suit with full knowledge of the facts "waived" the right of objection that said suit was not covered by its policy issued to the plaintiff. The use of the word "waived" in the count does not so restrict the plaintiff. If the facts alleged in the count show a cause of action in the plaintiff, the count should be sustained, whether the plaintiff's right arises from waiver, estoppel, or any other established doctrine of the law. As has been frequently said, the terms "estoppel" and "waiver" are sometimes loosely used interchangeably, especially with reference to situations arising under insurance policies; and the language of a number of cases cited by the plaintiff indicates that the term "waiver" has been applied to conduct similar to that of the defendant in the case at bar. We are of the opinion, however, that, in exact legal terminology, the defendant by its conduct should be said to have estopped itself to deny liability under the policy rather than to have waived any right under the policy. Whether the action of the defendant be termed a "waiver," "estoppel," "quasi-estoppel" or "an election ripening into an equitable estoppel," its liability is based upon the broad equitable principle which courts of law will recognize; that a person with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct, to the injury of another. This doctrine has been frequently applied in cases relating to employer's liability insurance. The defendant's counsel has argued that the doctrine of estoppel cannot be applied in this case because there does not appear by the allegations of the count to have been any misrepresentation or concealment of material facts on the part of the defendant; nor does it appear that the facts were not equally as well within the knowledge of the plaintiff as of the defendant. These objections overlook the distinction between quasi-estoppel and estoppel by misrepresentation.

- (3) "The term 'quasi-estoppel' has been applied to certain legal bars which are in some respects analogous to estoppel *in pais* and which have the same practical operation as an es-

toppel *in pais*, but which nevertheless differ from that form of estoppel in essential particulars. The term includes the doctrine of election, the principle which precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver." 16 Cyc. 784.

In *Tozer v. Ocean Acc. etc., Corp.*, 94 Minn. 478, the court said: "No doubt appellant acted in good faith, but bad faith is not always necessary to estoppel, and it does not always follow that no estoppel will arise when the party to whom the representation is made has knowledge as to the truth of all the facts. Appellant comes within the rule that a person is precluded from taking, merely because his interests may change, a position inconsistent with the one previously assumed by him and to the prejudice of a third person."

The defendant has also urged that the principle of estoppel cannot be applied to extend the liability of the defendant beyond the terms of the policy and to furnish indemnity to the insured for loss arising from an accident to a person not an employee. The doctrine of quasi-estoppel is broad enough to include such a result, and its application is not restricted, as the defendant urges, to cases where the conduct of the insurer precludes him from insisting upon a forfeiture for the violation of a condition contained in the policy. It is the nature of this principle to extend liability; it is not invoked for the purpose of enforcing a true obligation or one that is clearly defined by the terms of a contract. In this consideration it is not material what the defendant's real liability under the policy was, for by its own election of positions it is now precluded from asserting that its liability was not in accordance with its apparent admissions. In *Employers' Liability Assur. Corp. v. Chicago &c. Co.*, 141 Fed. 962, the court said: "The act of the plaintiff in error, in taking control and dominion of the action for damages, and keeping such control and dominion until judgment was entered, without notice to the defendant in error that it did not consider itself liable under the policy—thereby taking from the defendant in error the

control and dominion of the action—is such a construction of the policy, by contemporaneous acts, as estops plaintiff in error from denying liability, now that that action is at an end. To take any other view of this case, would be to hold that the assurer could effectually tie the hands of the assured, in an action that might, or might not, on a close construction of the policy, be covered by the terms of the policy, and then, the cause being determined against it, insist that upon a closer reading of the policy, the assured ought to have been left to make its own defense, and at its own risk. This cannot be the law.”

Other cases, based upon employers’ liability insurance contracts, in which the doctrine of estoppel has been applied, are: *Glen Falls &c. Co. v. Travelers’ Ins. Co.* 162 N. Y. 399; *Royle Mining Co. v. Fidelity &c. Co.* 126 Mo. App. 104; *Globe Navigation Co. v. Maryland Casualty Co.* 39 Wash. 299; *Tozer v. Ocean Acc. &c. Corp.* 94 Minn. 478; *Tozer v. Ocean Acc. &c. Corp.* 99 Minn. 290.

The third count of the amended declaration sets out a cause of action and the demurrer to said count was properly overruled.

We find no reversible error in the ruling of the Superior Court excluding evidence, offered by the defendant, to show that said Driscoll was not in the employ of the plaintiff at the time of the accident. There was a count in the amended declaration, which alleged that Driscoll was in the employ of the plaintiff at the time of the accident, but the case was plainly tried before the justice of the Superior Court sitting without a jury, upon the third count. The evidence before the justice fully warranted him in finding that the defendant’s conduct precluded it from raising the question as to Driscoll’s employment, and in that view it was immaterial whether, in fact, Driscoll was or was not employed by the plaintiff.

The testimony fully warranted the decision of the justice and we find no error therein.

Defendant’s exceptions are overruled.

By rescript already filed the case has been remitted to the Superior Court with direction to enter judgment upon the decision.

Gardner, Pirce, and Thornley, for plaintiff.

Charles R. Haslam of counsel.

Edwards and Angell, for defendant.

William A. Spicer, Jr., of counsel.

WILLIAM PODRAT *vs.* NARRAGANSETT PIER RAILROAD CO.

MARCH 13, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Evidence.*

Where defendant had brought out the fact that an important witness for plaintiff, who had been present at former trials of the case, was absent from the trial, with the object of laying the foundation for an argument to the jury that plaintiff did not dare to call the witness, and plaintiff being permitted, after objection, to show the reason, testified that the last time witness was called, all he would say was that he did not remember, and he did not summon him for that reason and no attempt was made to discover whether the loss of memory was real or feigned, the admission of plaintiff's explanation was not prejudicial.

(2) *Evidence. Books. Memoranda.*

In an action against a carrier for loss of goods in transit, where it appeared that a list of the goods was made by a clerk on a slip, and the list was posted by the bookkeeper in a book, and the slip was afterwards lost, the bookkeeper was properly permitted to testify as to the items making up the bill sent to defendant and that the items were taken from the entries made in such book.

(3) *Reading Testimony to Jury.*

Counsel in their argument to the jury, may be permitted, in the discretion of the trial judge, to read to the jury from testimony in the case.

(4) *Carriers. Loss of Goods. Delivery to Connecting Carrier.*

In an action against a carrier for loss of goods in transit, defendant requested the court to charge "Plaintiff must prove delivery to the N. R. R. Co. (defendant) at K. of the goods alleged to have been lost. Proof of delivery to the W. R. R. Co. (original carrier) at H., is not sufficient." The court modified it as follows: "But proof of acceptance of the shipment unobjected to by the N. Y., N. H. & H. R. R. Co. (connecting carrier) at W. and the defendant company at K. is sufficient evidence of delivery so that there

would be a presumption that the shipment remained as it was when it left H:—

Held, that, as agent of defendant was apprised of the contents of the car at K., and had the opportunity to inspect it, the charge was unobjectionable.

(5) *Carriers. Loss of Goods. Burden of Proof.*

Held, further, that under the circumstances a request to charge that the burden of proof was upon defendant to show that the loss did not occur while the goods were in its possession was properly granted.

(6) *Uncontradicted Evidence. Damages. Value.*

Where there was no testimony to contradict it, the jury were rightly instructed to accept the plaintiff's testimony upon the question of value.

(7) *Carriers. Liability for Loss of Goods. Bills of Lading.*

Conditions in a bill of lading were as follows:—

"No carrier shall be liable for loss—after property is ready for delivery to consignee."

Property not removed by the person entitled to receive it within 24 hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner,—"

Defendant claimed that after car arrived at destination, it was checked up within a few minutes, and that as soon as this record was made, goods were ready for delivery to consignee and liability of carrier terminated:—

Held, that, until due notice had been given consignee that goods were ready for delivery, or until a reasonable time had elapsed within which consignee might receive the goods, the liability of carrier was not terminated.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and overruled.

DUBOIS, C. J. This is an action of trespass on the case for negligence. The declaration sets forth that the plaintiff shipped certain cases of goods from Hope Valley to Narragansett Pier; that the goods in question were carried by the Wood River Branch Railroad to Wood River Junction, its terminus, and there delivered to the New York, New Haven and Hartford Railroad Company, and carried by it to Kingston Junction, where they were delivered to the Narragansett Pier Railroad Company to be carried to Narragansett Pier, and that while in the possession of the defendant company, one case containing goods of the value of five hundred dollars, was lost by the negligence of its servants and agents.

The defendant pleaded the general issue. Upon trial before

a jury in the Superior Court, verdict was rendered for the plaintiff for \$500. The defendant filed its petition for a new trial on the grounds that the verdict is against the evidence and the weight thereof; that the verdict is against the law and that the damages awarded are grossly excessive. This motion was denied by the Superior Court and the defendant took an exception thereto and gave notice of its intention to prosecute a bill of exceptions upon all the exceptions taken by it in the course of the trial. Thereafterwards the defendant filed its bill of exceptions, which was duly allowed, containing eighteen exceptions whereof the defendant now relies upon the validity of the following: That the court erred in permitting the plaintiff to explain his failure to call Isadore I. Abelson as a witness. Also, in allowing the plaintiff's witness Munroe to testify from what book the items appearing on a bill sent to the defendant were taken without first requiring that the book be offered in evidence. Also, in permitting the plaintiff's attorney to read from the record of a former trial not in evidence during his closing argument to the jury. Furthermore, in charging the jury that the Podrat car was opened after it was put onto the defendant's tracks at Kingston. Likewise, in modifying the defendant's third request to charge and in granting the plaintiff's first, second and fourth requests to charge, and in denying the defendant's motion for a new trial.

- (1) In cross-examination of the plaintiff the counsel for defendant elicited the following testimony: "Q. What is this man's name that worked for you at Hope Valley? A. Isadore Abelson. Q. Did he run the store at Hope Valley that winter? A. Yes. Q. Had charge of it? A. Yes. Q. Where does he live now? A. Lives in Wakefield, runs a store in Wakefield. Q. Where does he live? A. He owns a store there. Q. Does he live in Wakefield? A. I expect he does. Q. Just answer the questions and nothing more. Is he in the court room now? A. No, sir, I haven't seen him, he may be here. Q. This case has been tried before? A. Several times. Q. He has been present at those trials, hasn't he? A. I guess he was once or twice. Q. Wasn't he more than once or twice? I don't know,

once or twice I guess he has been, that's all. Q. One time he was—A. Away. Q. And the rest of the time? A. Yes, he was here the last time too, that's all. Q. Now he helped you to pack these goods at Hope Valley? A. Yes. Q. He made out a list for you at Hope Valley? A. Yes. Q. And helped you to load them in the team and on the car at Hope Valley? A. Yes. Q. And went with you to Wakefield that same day? A. Yes. Q. You and he went on the same train that the freight went on? A. Yes, on the passenger car. Q. And he went down to the Pier with you the next day? A. Yes, sir. Q. And he was with you at the station when you got the freight? A. Yes. Q. He was with you in your store when you checked up the number of goods which you claimed were lost, was he? A. Yes, I unpacked it and he checked it up. Q. So he knows this case from beginning to end, doesn't he? A. Yes." In redirect examination the plaintiff further testified: "Q. Now you have been asked about Isadore Abelson; did you have him here at the last trial? A. Yes. Q. Did you put him on the stand? A. Yes. MR. JONES: I object. Jury taken out. MR. OLNEY: This question has been asked if he has been summoned— MR. JONES: If he has, why that is all. But this is not proper evidence— MR. OLNEY: The fact is that Abelson hasn't spoken to him for over a year, and that when he was here at the former trial he wouldn't answer a single question. MR. JONES: Wouldn't the court record be better evidence? THE COURT: I will permit you to inquire. Mr. Jones' exception noted. Jury admitted. Q. Now, I will ask you, Mr. Podrat, if you have summoned Isadore Abelson for this trial? A. No, sir. Q. And why haven't you summoned him? MR. JONES: I want to object to that. Mr. Jones' exception noted. A. Because the last time the only thing he would answer was 'I don't remember.' Q. And you didn't summons him at this trial because of that reason? A. No, sir. Mr. Jones' exception noted."

We are unable to discover that the court erred in the circumstances. The defendant had drawn the attention of the jury to the facts that Abelson, the former clerk of the plaintiff,

had been present at former trials of the case, and was absent from this; that he was the person who helped the plaintiff to pack the goods, and made out the list for him, and was the one who knew the case from beginning to end. As was said by Holt, J., in *Robinson v. Woodford*, 37 W. Va. 377, 392: "Apparently, in the case of this anomalous kind of evidence, it is competent for either side to put in evidence the fact that the other side has not called the witness, and in argument to allege that the reason for this is that he dared not do so." The object of the defendant's inquiries was to lay the foundation for such an argument. If it has been injured in the premises it is because the court has allowed the foundation for the argument to be weakened or destroyed, thereby depriving the defendant of the benefit of the argument before the jury. But it appears from the testimony of the plaintiff himself that it is true that he did not dare to call the witness because the last time he did call upon him to testify all that he would say was that he did not remember. There the incident closed. No attempt was made to discover whether the loss of memory was real or feigned or what was the cause thereof, the fact alone was stated. The exception is without merit.

- (2) Concerning the next exception it appeared that when the plaintiff and his clerk Abelson packed the goods in cases for shipment from Hope Valley to Narragansett Pier, Mr. Abelson made lists of the goods shipped, and that when the cases that were delivered to the plaintiff at Narragansett Pier were unpacked the contents of each case were verified by the lists thereof made by Mr. Abelson. When it was ascertained that one case had not arrived the contents of that case were also determined by Mr. Abelson's list thereof. At the request of the plaintiff, his bookkeeper Mrs. Martha A. Munroe, posted the contents of the missing case, contained in the slip already referred to, in a book and the slip was left in the possession of Mr. Abelson who afterwards reported to the plaintiff that he had lost the same. It appeared that the plaintiff can sign his name but otherwise neither writes nor reads. From the entries in the book so posted from the slip the plaintiff's bills were

made out that were sent to the defendant. The bookkeeper was asked the following question: "From what are the items that made that bill up taken? A. This book. Q. Now will you read the items of that bill? A. To 38 men's suits at \$8., \$304; 10 youth's suits at \$6.75, \$67.50; 11 boy's suits at \$3., \$33; 3 overcoats at \$8., \$24; 26 pairs of pants at \$2.75, \$71.50, making a total of \$500. Q. What is the date of that? A. May 16, 1906." The ruling permitting these questions to be asked and answered is the one to which this exception relates. We see no impropriety in the ruling. It was a perfectly business-like transaction to transfer to a book the contents of the slip, making a permanent entry from the original memorandum. It is ordinary prudence that suggests the posting of such memoranda, and no harm was done to the defendant by the ruling in question.

- (8) The next exception was taken as follows: "During Mr. Olney's argument he reads from testimony taken at the former trial before Mr. Justice Mumford, to which Mr. Jones objects, objection overruled and Mr. Jones' exception noted," but it also appears from the transcript that after the testimony for the defendant had been given: "Mr. Olney reads from testimony taken at trial before Mr. Justice Mumford, as follows: Edward I. Coggeshall questions, 234, 235, 236. R. Franklin Locke, Page 226, questions 32, 33, 34, 35, 38, 39, 40, 41." It appeared in argument before us that the testimony read in argument was no other than that previously read in evidence without objection. Counsel for defendant seems to think it was taking an unfair advantage of his client to read evidence in argument but such a matter may safely be left to the discretion of the trial judge. Counsel in argument may, and often do, say to the jury that they do not wish to color or distort the meaning of a witness in giving certain testimony and for the purpose of treating him with the utmost candor and consideration they will give his exact language *verbatim et literatim*. The counsel may do this from his own notes or from the stenographer's notes, when obtainable, or by reading from a transcript of testimony or from depositions and there is no impropriety in

so doing as long as the same is sanctioned by the presiding judge, who would doubtless check any attempt to take an undue advantage of the situation.

The next exception charges the court with a misstatement of the evidence. The statements objected to are as follows: "Tucker testified he sealed the car on both sides, seal number 79 of the New York, New Haven and Hartford Railway Company, took the car and brought it here to Kingston, arriving here sometime in the vicinity of one o'clock, I believe, of the same day. That sometime about 1:50, according to the testimony, the car was run over on to the tracks of the Narragansett Pier Railway Company. The car passed over onto their tracks about 2:50, about an hour and fifty minutes after arriving here in Kingston. The car was opened here after it was put over on to the defendant's tracks, when the seals were broken and a roll of paper was put in to be shipped to some one named Thompson at Narragansett Pier, according to the testimony, and the agent of the defendant company sealed the car again." It is true that the court was slightly in error in stating that the seals were broken after the car had been placed upon the defendant's tracks. The seal was broken and the roll of paper was placed in the car at Kingston while the car was upon the tracks of the New York, New Haven and Hartford Railroad Company but at a time when the car was in the control of the defendant. The third condition printed upon the back of the bill of lading contains the following: "No carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee." At the time the seal was broken and the paper was placed in the car the property had not been delivered, but was ready for delivery to the defendant, and, under the condition aforesaid, liability of the New York, New Haven and Hartford Railroad Company was at an end and the possession of the defendant company commenced. That is, it has a right to, and did, exercise dominion over the car and its contents before it was transshipped on to the tracks

of the defendant. The misstatement of fact is merely technical and no harm was done to the defendant thereby.

- (4) The defendant's third request to charge, which was modified by the court, reads as follows: "3. The plaintiff must prove delivery to the Narragansett Pier Railroad at Kingston Junction of the goods alleged to have been lost. Proof of delivery to the Wood River Branch Railroad at Hope Valley is not sufficient." The modification complained of is the following: "But proof of acceptance of the shipment unobjected to by the New York, New Haven and Hartford Railroad Company at Wood River Junction and the defendant company here at Kingston is sufficient evidence of delivery, so that there would be a presumption that the shipment remained intact, that the shipment remained as it was when it left Hope Valley." In the circumstances of this case we see no objection to the modification. It appears that the agent of the defendant was apprised of the contents of the car at Kingston and had the opportunity before he sealed the car of verifying the way bill or of demonstrating its falsity and of ascertaining the actual contents of the car by personal inspection. The defendant after neglecting this opportunity cannot require that the plaintiff, who had no such opportunity, should furnish it with the information that was within its reach and which by the exercise of due diligence it might have obtained. It is no valid objection to urge that the cases could not be conveniently counted in the car because it was by counting them in the car after its arrival at Narragansett Pier that the discovery was made, either that there was one case of goods missing or that there was a discrepancy between the goods mentioned in the bill of lading and the goods actually shipped.

- (5) The plaintiff's first and second requests to charge are as follows:

"FIRST: You are instructed that if you believe from the testimony in the case that there was delivered to the first carrier, namely, the Wood River Branch Railroad Company, thirteen boxes of dry goods for shipment to Narragansett Pier, Rhode Island, as shown in the bill of lading and that among these

there was one that contained thirty-eight suits of men's clothes; ten youths' suits; eleven boys' suits; three overcoats and twenty-six pairs of pants, and receipt of this shipment consigned to this plaintiff was had by the subsequent connecting carriers, to wit, the New York, New Haven and Hartford Railroad Company, and the Narragansett Pier Railroad Company, without any objection on their part, then there is raised the presumption in this action that there was still the thirteen cases or boxes as when received by the first carrier, the Wood River Branch Railroad Company, and the burden is on the Narragansett Pier Railroad Company to prove that there was only twelve cases or boxes when it received the shipment, there being a presumption that the number continued until received by the last carrier, to wit, the Narragansett Pier Railroad Company."

"SECOND: And you are further instructed that if you believe from the testimony in the case that there was delivered to the first carrier, namely, the Wood River Branch Railroad Company, thirteen cases, as shown in the bill of lading, for delivery at Narragansett Pier and that one of these contained the goods claimed to have been lost, *viz.*: thirty-eight men's suits of clothes; ten youths' suits; eleven boys' suits; three overcoats; twenty-six pairs of pants, and the shipment was accepted by the connecting carriers without objection, and loss of these appears at the point of destination, then the burden of proof is upon the last carrier, to wit, the Narragansett Pier Railroad Company, to show that the loss did not occur while the goods were in its possession."

For the reasons already given we see no objection to the granting of these requests.

- (6) The defendant claims that the court erred in granting the plaintiff's fourth request to charge as follows:

"And you are further instructed that the only evidence of the value of the goods in this case is that adduced by the plaintiff and that this is for the sum of five hundred dollars, and that if you find that the defendant is liable for the loss, then this sum, that is the sum of five hundred dollars, is the amount which this plaintiff is entitled to have and recover of this defendant, the

Narragansett Pier Railroad Company." The court added: "The only testimony as to the value is that the goods were worth \$500, therefore if the plaintiff is entitled to recover, he is entitled to recover the sum of \$500."

Concerning this the defendant makes the following argument: "The only testimony introduced by the plaintiff as to the value was that of the plaintiff himself. The plaintiff was an interested witness. His testimony was not corroborated by invoices or written evidence of any kind. The fact that the plaintiff filed a claim for the loss of eighty-eight articles of clothing separated into five different classes and their aggregate value amounts to just \$500 is sufficient to justify the jury in looking with suspicion on the unsupported testimony of an interested witness as to value."

If the jury did not believe the story of the plaintiff concerning the loss of his goods, they could have found for the defendant. As the jury found for the plaintiff they must have placed reliance upon his testimony.

There is nothing inherently incredible in the statement that men's suits of clothes should be worth eight dollars a suit; that youth's suits were each of the value of six dollars and seventy-five cents; that boy's suits were three dollars and thirty-three cents apiece; that overcoats were each worth eight dollars and that each pair of pants was worth two dollars and seventy-five cents. If the statement was untrue, it was false swearing upon a material issue and not lightly to be presumed. As there was no testimony tending to contradict it, the jury were rightly instructed to accept the same upon the question of value.

(7) The defendant's last exception is founded upon the court's denial of its motion for a new trial. The defendant in support of this exception relies upon condition 3 on the back of the bill of lading and hereinbefore set out, and claims that the Podrat car arrived at Narragansett Pier at 3:30 P. M. and was checked up and a record of the contents made within a few minutes, and that as soon as this record was made the goods were ready for delivery to the consignee, and that under the terms of

the contract, namely, the bill of lading, the liability of the carrier terminated; that it was not thereafter liable as carrier for loss of the goods. That might be the case after due notice was given to the consignee that the goods were ready for delivery, but until such notice had been given or until a reasonable time had elapsed within which the consignee might come and receive his goods the liability of the carrier did not terminate. In this connection the provisions of condition 5 are illuminating: "5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination may be kept in the car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed or otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The carrier may make a reasonable charge per day for the detention of any vessel or car, and for use of track after the car has been held forty-eight hours for loading or unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station at which there is no regularly appointed agent, shall be entirely at risk of owner when unloaded from cars, or until loaded into cars; and when received from or delivered on private or other sidings shall be at owner's risk, until the cars are attached to and after they are detached from trains."

When Mr. Podrat came for his goods the next day no claim was made that the liability of the carrier had terminated. The case presented a disputed issue of fact and is therefore a case peculiarly within the province of a jury. A jury has decided the cause and the justice who presided at the trial has refused to set the verdict aside on the ground that the verdict is against the evidence. Under the rule referred to in the case of *Wilcox v. Rhode Island Company*, 29 R. I. 292, such ruling will be sustained in the absence of evidence that the judge erred in arriving at such a conclusion. We find no such error.

The defendant's exceptions are overruled and the case is

remitted to the Superior Court with direction to enter judgment on the verdict.

Frederick C. Olney, for plaintiff.

C. M. Van Slyck, Frederick A. Jones, Benjamin W. Case, for defendant.

HERBERT W. BARBER vs. HERBERT W. BARBER, Town Treasurer, *et. al.*

MARCH 31, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Actions Against Towns. Service of Process.*

As the statutes do not authorize service upon the town clerk for the purpose of enforcing a claim against a town, a town is not concluded by such service, and any judgment based on such service would be a nullity.

(2) *Municipal Corporations. Action by Person Against Himself in Representative Capacity.*

A collector of taxes cannot bring an action against himself as town treasurer to recover compensation for his services as collector.

(3) *Town Treasurer Liable for Payment of Judgment.*

Under the statutes relative to actions to recover claims against towns, the primary liability to pay a judgment obtained in an action brought under the statute "against such treasurer" is imposed upon the town treasurer although the ultimate payment is to be made by the town, if necessary, by a special tax levied for the reimbursement of the treasurer.

(4) *Action Against Town. Town Treasurer. Town Council.*

In an action against a town treasurer under the statute, he has complete control of the defence, without any authority over him by the town council.

(5) *Town Treasurer. Removal. Town Council.*

A town treasurer is not removable even for cause, by a town council.

(6) *Claims Against Town. Town Council. Appropriations.*

A town council has no jurisdiction to order the payment from the town's funds, either of an original claim or of the judgment thereon, until the tax-paying electors have made an appropriation therefor. Whatever sum is so appropriated, it is the duty of the town treasurer to pay, and he is entitled to receive in reimbursement of a judgment paid by him, whether the same be sanctioned or repudiated by the town council.

ASSUMPSIT. Certified to Supreme Court on agreed statement of facts.

BLODGETT, J. By the writ and declaration in this case the plaintiff seeks to recover "in an action of the case in the nature of assumpsit" the sum of \$8,250.44, which he avers is due him from the town of Warwick as compensation for his services as collector of taxes therein for the year 1910. The parties defendant named in the writ are "Herbert W. Barber as Town Treasurer of the Town of Warwick, a municipal corporation, duly existing under the laws of said State, and located in the County of Kent therein and said Town of Warwick." The officer's return on the writ is as follows: "Kent, Sc. At Warwick in the county of Kent on this 19th day of December, A. D. 1910, I have made service of the within writ as within commanded by leaving a true and attested copy of the same with Herbert W. Barber, Town Treasurer of the Town of Warwick, and James T. Lockwood, Town Clerk of said Warwick, the said defendants, in their hands and possession. Michael B. Lynch, Sheriff."

- (1) Inasmuch as the statute does not authorize service upon the town clerk for the purpose of enforcing a claim against the town, but provides for service of process on the town treasurer only, it is evident that the town is not concluded by service upon the town clerk and that any judgment based on such service would be a nullity. *Valcourt v. City of Providence*, 18 R. I. 160. The provisions of Gen. Laws. 1909, cap. 46, § 12, are as follows: "Every person who shall have any money due him from any town or city, or any claim or demand against any town or city, for any matter, cause or thing whatsoever, shall take the following method to obtain the same, to wit: Such person shall present to the town council of the town, or to the city council of the city, a particular account of his claim, debt, damages or demand, and how incurred or contracted; which being done, in case just and due satisfaction is not made him by the town or city treasurer of such town or city within forty days after the presentment of such claim, debt, damages

or demand aforesaid, such person may commence his action against *such treasurer* for the recovery of the same."

The case must therefore be considered as if the only service made were upon the town treasurer and the counsel for Barber, town treasurer, appears so to have considered it by his pleas.

Inasmuch as certain questions raised are of public interest it is not inexpedient to consider the pleadings in the case at some length.

- (2) The declaration is in three counts, of which the first is as follows: "For that at said Warwick on, to wit, the eighth day of November, A. D. 1909, the plaintiff was by the Town Council of said Warwick elected collector of taxes of said town of Warwick and the plaintiff accepted said office and took the engagement thereof prescribed by statute and gave the bond prescribed by statute, which bond was, at said Warwick, to wit, on the twenty-fourth day of January, A. D. 1910, accepted and approved by the town council of said Warwick; and thereafter, to wit, on the eleventh day of February, A. D. 1910, the plaintiff, being then and there town treasurer of said town, as well as collector of taxes thereof received from the town clerk of said town a warrant under the hand of said town clerk, commanding said plaintiff to proceed and collect the several sums of money expressed in the copy of the assessment of taxes to which said warrant was affixed, said taxes having theretofore been duly assessed by the assessors of taxes of said town of Warwick; and the plaintiff avers that he forthwith did proceed and execute the duties imposed on him as collector of taxes as aforesaid, and did collect the several sums of money in said assessment expressed of the persons and estates liable therefor, to the amount of, to wit, one hundred and sixty-five thousand and eight dollars and eighty-eight cents (\$165,008.88) and did pay over the sum so collected to Herbert W. Barber, town treasurer of said town of Warwick; and the plaintiff avers that he has not agreed with said town of Warwick for a less sum than five per cent. of the sum so collected by him; whereby and in consideration whereof said town of Warwick agreed and upon itself assumed to pay to the plaintiff five per cent. of the

sum so collected by him, to wit, the sum of eight thousand two hundred and fifty dollars and forty-four cents (\$8,250.44) when thereunto duly requested. And the plaintiff avers that more than forty days before the commencement of this action, to wit, on the twenty-second day of August, A. D. 1910, he presented to said town council of said town of Warwick a particular account of his said claim, debt and demand, and how the same was contracted and incurred, and no just and due satisfaction has been made to him by the town treasurer of said town of Warwick or by said town."

To said first count the following plea is filed: "And the said defendant in the above entitled action comes and defends the wrong and injury, when, etc., mentioned in the first count in said declaration, and says that he or it did not undertake or promise, in manner and form as the said plaintiff has in said first count in his declaration thereof complained against said defendant, and of this he puts himself upon the country. Herbert W. Barber, Town Treasurer. By his attorney, Lester T. Murphy."

The second count is as follows: "And the plaintiff further complains of the defendants as in an action of debt, by virtue of the statute in such case made and provided: For that at said Warwick on, to wit, the eighth day of November, A. D. 1909, the plaintiff was by the town council of said Warwick elected collector of taxes of said town of Warwick, and the plaintiff accepted said office and took the engagement thereof prescribed by statute and gave the bond prescribed by statute, which bond was, at said Warwick, to wit, on the twenty-fourth day of January, A. D. 1910, accepted and approved by the town council of said Warwick; and thereafter, to wit, on the eleventh day of February, A. D. 1910, the plaintiff, being then and there town treasurer of said town, as well as collector of taxes thereof, received from the town clerk of said town a warrant under the hand of said town clerk, commanding said plaintiff to proceed and collect the several sums of money expressed in the copy of the assessment of taxes to which said warrant was affixed, said taxes having theretofore been duly assessed by the assessors

of taxes of said town of Warwick; and the plaintiff avers that he forthwith did proceed and execute the duties imposed on him as collector of taxes as aforesaid, and did collect the several sums of money in said assessment expressed of the persons and estates liable therefor to the amount of, to wit, one hundred and sixty-five thousand and eight dollars and eighty-eight cents (\$165,008.88) and did pay over the sum so collected to Herbert W. Barber, town treasurer of said town of Warwick; and the plaintiff avers that he has not agreed with said town of Warwick for a less sum than five per cent. of the sum so collected by him; whereby and by force of the statute in such case made and provided, to wit, section 4 of chapter 62 of the General Laws of 1909 an action hath accrued to the plaintiff to demand and recover of the said town of Warwick five per cent. of the sum so collected by him, to wit, the sum of eight thousand two hundred and fifty dollars and forty-four cents (\$8,250.44). And the plaintiff avers that more than forty days before the commencement of this action, to wit, on the twenty-second day of August, A. D. 1910, he presented to said town council of said town of Warwick a particular account of his said claim, debt and demand, and how the same was contracted and incurred, and no just and due satisfaction has been made to him by the town treasurer of said town of Warwick or by said town." And following is the plea thereto:

"And as to the second count in said declaration, the said defendant in the above entitled action comes and defends the wrong and injury, when, etc., mentioned in said second count in said declaration, and says that the defendant does not owe the said sum of money demanded, or any part thereof, in manner and form as the said plaintiff hath in said second count in his declaration thereof complained against him, and of this he puts himself upon the country. Herbert W. Barber, town treasurer, By his attorney, Lester T. Murphy."

The third count is thus stated: "And the plaintiff further complains of the defendants as in an action of debt by virtue of the statute in such case made and provided: For that at said Warwick, on, to wit, the eighth day of November, A. D. 1909,

the plaintiff was by the town council of said Warwick elected collector of taxes of said town of Warwick. And by said town council on said eighth day of November, A. D. 1909, it was voted that the salary of the collector of taxes be fixed at the sum of \$600.00; and at a financial town meeting held in said Warwick on, to wit, the sixteenth day of November, A. D. 1909, it was voted to appropriate the sum of \$600.00 for the salary of the collector of taxes; and thereafterwards, to wit, on the twenty-second day of November, A. D. 1909, the said plaintiff in writing made known to the town council of said Warwick, then and there in regular session, and to said town, that he declined to accept said sum of \$600.00, as compensation for his services as collector of taxes and declined to agree with said town upon said sum as such compensation, and by said town council it was then and there voted that said communication be received and recorded, and thereafterwards the plaintiff took the engagement thereof prescribed by statute and gave the bond prescribed by statute, which bond was at said Warwick, to wit, on the twenty-fourth day of January, A. D. 1910, accepted and approved by the town council of said Warwick; and thereafter, to wit, on the eleventh day of February, A. D. 1910, the plaintiff, being then and there town treasurer of said town as well as collector of taxes thereof received from the town clerk of said town a warrant under the hand of said town clerk, commanding said plaintiff to proceed and collect the several sums of money expressed in the copy of the assessment of taxes to which said warrant was affixed, said taxes having theretofore been duly assessed by the assessors of taxes of said town of Warwick; and the plaintiff avers that he forthwith did proceed and execute the duties imposed on him as collector of taxes as aforesaid, and did collect the several sums of money in said assessment expressed of the persons and estates liable therefor, to the amount of, to wit, one hundred and sixty-five thousand and eight dollars and eighty-eight cents (\$165,008.66) and did pay over the sum so collected to Herbert W. Barber, town treasurer of said town of Warwick; and the plaintiff avers that he has not agreed with said town of Warwick for a less sum than five

per cent. of the sum so collected by him; whereby and by force of the statute in such case made and provided, to wit, section 4 of Chapter 62 of the General Laws of 1909, an action hath accrued to the plaintiff to demand and recover of the said town of Warwick five per cent. of the sum so collected by him, to wit, the sum of eight thousand two hundred and fifty dollars and forty-four cents (\$8,250.44). And the plaintiff avers that more than forty days before the commencement of this action, to wit, on the twenty-second day of August, A. D. 1910, he presented to said town council of said town of Warwick a particular account of his said claim, debt and demand, and how the same was contracted and incurred and no just and due satisfaction has been made to him by the town treasurer of said town of Warwick or by said town.

"To the damage of the plaintiff fourteen thousand dollars (\$14,000) as laid in his writ dated the seventeenth day of December, A. D. 1910," etc. And the plea thereto is the following:

"And as to the third count in said declaration, the said defendant in the above entitled action comes and defends the wrong and injury, when etc., mentioned in said third count in said declaration, and as to all of the said several supposed promises and undertakings in said declaration mentioned, except as to the sum of six hundred (\$600) dollars, parcel of the said several sums of money mentioned in said third count of said declaration, says that he did not undertake or promise in manner and form as the said plaintiff in said third count in said declaration thereof complained against said defendant, and of this he puts himself upon the country. And as to the said sum of six hundred (\$600) dollars, parcel of the said several sums of money in said third count of said declaration mentioned, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the defendant, to recover any more or greater damages than the said sum of six hundred (\$600) dollars, parcel of the said several sums of money in said third count of said declaration mentioned, in this behalf, because the defendant says, that after the making of the said several supposed promises and under-

takings in said third count mentioned, as to the said sum of six hundred (\$600) dollars, parcel, etc., and before the commencement of this suit of this plaintiff against this defendant, the said defendant was ready and willing, and has always from the time of making the said several promises and undertakings in said third count in said declaration mentioned, as to the said sum of (\$600) six hundred dollars, been ready to pay, and still is ready to pay to the said plaintiff the said sum of six hundred (\$600) dollars; and the said defendant is now ready to bring said sum of six hundred (\$600) dollars into court here ready to be paid to the said plaintiff, if he will accept it, and this the defendant is ready to verify:

"Wherefore he, said defendant, prays judgment if the said plaintiff ought to have or maintain his aforesaid action against said defendant to recover any more or greater damages than said sum of six hundred (\$600) dollars. Herbert W. Barber, town treasurer, By his attorney, Lester T. Murphy."

From an examination of the foregoing it appears that in the plea to the first count Barber as town treasurer denies the liability therein asserted by Barber, tax collector. In the plea to the second count Barber as town treasurer avers that "the defendant does not owe the said sum of money demanded, or any part thereof, in manner and form as the said plaintiff (Barber as tax collector) hath in said second count in his declaration thereof complained against him." In the third count Barber as town treasurer admits a liability in the amount of \$600 to Barber as tax collector, while denying all the other "several supposed promises and undertakings" in said count set forth.

It appears that the case has been certified to this court under the provisions of Gen. Laws, 1909, cap. 298, § 4, upon an agreed statement of facts between Barber plaintiff as tax collector, and Barber defendant, as town treasurer, as follows:

"The plaintiff, Herbert W. Barber, was upon the eighth day of November, A. D. 1909, duly elected collector of taxes of said town of Warwick by the town council of said town, and thereafter, to wit, upon the sixteenth day of November, A. D. 1909,

by the electors of said town qualified to vote upon any proposition for the expenditure of money and imposition of tax in the financial town meeting assembled, it was voted to appropriate for the salary of the collector of taxes for the ensuing year the sum of six hundred (\$600) dollars, and in making appropriations for certain salaries said salaries were expressly declared to be in lieu of all fees which should be turned into the town treasury, but no such provision was made in regard to the salary of the collector of taxes.

"On the twenty-second day of November, A. D. 1909, the plaintiff presented to the town council of said town in regular session a communication in writing bearing the same date and signed by him of the following tenor, namely:

"To the Honorable Town Council of the Town of Warwick and to said Town of Warwick:

The undersigned having been elected collector of taxes of said town hereby makes known to said town council and to said town that he declines to accept the sum specified by the vote of the financial town meeting of said town as compensation for his services as collector of taxes for the ensuing year, and refuses to agree with said town upon the sum so specified in said vote.

"Very respectfully,

"HERBERT W. BARBER."

and thereupon when the said town council was in regular meeting assembled it was voted that the said communication from the plaintiff be received and recorded.

"The said Herbert W. Barber thereafter qualified by taking the oath of office and by presenting the bond required for the faithful discharge of the duties of his office, and by said town council on the twenty-fourth day of January, A. D. 1910, the bond so given by said plaintiff was accepted and approved.

"On the fourteenth day of February, A. D. 1910, one Robert T. Thurber, made application to said town council then in regular session assembled, to be appointed to the office of tax

collector and it was voted that the matter be laid upon the table.

"On the eleventh day of February, A. D. 1910, the plaintiff received from the town clerk of said town of Warwick his warrant, to which was affixed a copy of the assessment, said warrant directing the plaintiff as tax collector to proceed and collect the several sums of money expressed in said copy of said assessment of taxes, which had been theretofore duly assessed by the assessors of taxes of the town of Warwick, and the plaintiff as said collector of taxes proceeded to execute the duties imposed upon him and did collect the several sums of money in said assessment expressed of the persons and estates liable therefor to the amount of one hundred and sixty-five thousand and eight dollars and eighty-eight cents (\$165,008.88) and paid over the sum so collected by him to said Herbert W. Barber as town treasurer of said town of Warwick.

"That on the 22nd day of August, A. D. 1910, the said plaintiff presented to the town council his claim for compensation, namely, five per cent. of the taxes then collected, to wit, one hundred and fifty-four thousand two hundred and thirty-two dollars and sixty cents (\$154,232.60).

"That up to the twenty-third day of December, A. D. 1910, the taxes collected by the plaintiff amounted to one hundred and sixty-five thousand and eight dollars and eighty-eight cents (\$165,008.88) and that five per cent. of said sum so collected is eight thousand two hundred and fifty dollars and forty-four cents (\$8,250.44).

"That although more than forty days have elapsed since the presentation to the town council of the claim of the plaintiff no satisfaction has been made to the plaintiff by the town treasurer or by any other person of the sum so claimed by him or any part thereof."

"In the above entitled cause it is agreed that the following facts may be added to the agreed statement of facts heretofore filed.

"On the eighth day of November, A. D. 1909, the town council of the town of Warwick elected the plaintiff tax collector

for said town: said council then proceeded to the transaction of other matters of business and thereafter passed a vote which purported to fix the salary of said tax collector at the sum of six hundred dollars (\$600.00); on the same day the said town council fixed by vote the salary of the town treasurer at twelve hundred (\$1,200.00) dollars; in the preceding year the salary of the town treasurer had been one thousand (\$1,000) dollars and the salary of the collector of taxes eight hundred (\$800) dollars; that thereafter on the sixteenth day of November, A. D. 1909, by the financial town meeting of said town of Warwick the sum of six hundred (\$600) only was appropriated for the salary of the town treasurer; and said financial town meeting passed a vote purporting to fix the salary at said sum of six hundred (\$600) dollars."

It is evident that the initial question is whether such an action by a plaintiff against himself can be maintained.

On the brief submitted by the counsel employed by Barber in his capacity as plaintiff it is stated that "in bringing the action by the plaintiff in his individual capacity against himself as town treasurer and against the town they have not overlooked the rule laid down in *Perkins v. Se Ipsam*, 11 R. I. 270, that the same person cannot be both plaintiff and defendant." In the opinion in that case it is said by Durfee, C. J. (p. 270): "This is an action of assumpsit to recover for services performed, and for care, provisions, and clothing furnished by the plaintiff to Jacob Perkins and his wife, during the lifetime of said Jacob. The plaintiff was administratrix on the estate of said Jacob, and commenced the action by service of the writ upon herself as such. She declared against herself as administratrix. The first plea is a plea in abatement. It was filed by Nathan M. Lockwood, and sets forth that he has been appointed administrator on the estate of said Jacobs, in place of the plaintiff, who has resigned. It prays that the writ may abate, because the plaintiff and the defendant named in the writ are the same person. The plaintiff demurs. Nathan M. Lockwood joins in the demurrer." . . . "The plaintiff, by way of justification, says the estate was represented insolvent, commissioners

were appointed, and her claim was submitted to them and by them rejected. The statute provides that any creditor, whose claim is wholly or in part rejected, may have the same determined at common law, in case he shall give notice thereof in writing in the office of the clerk of probate within forty days, and bring and prosecute his action within sixty days, after the report of the commissioners shall have been received. The plaintiff says she commenced the action against herself, because, if she had waited for the appointment of an administrator after the report was received, she would have lost her right of action under the statute by the delay. In this view, the case is a hard one. But it is not necessary for the plaintiff to delay resigning until the report was received. She might have resigned as soon as she knew the estate was insolvent, and she would have to submit her claim to the adjudication of commissioners. It is well for an administrator to resign when he finds the estate is insolvent, if he has a claim against it which is open to question; for, otherwise, he may be tempted to take advantage of his position, and favor himself at the expense of other creditors. We think the action cannot be maintained. The demurrer will therefore be overruled, and the plea in abatement sustained. Demurrer overruled."

- (3) In that case it was held, indeed, that, as administratrix, she had the right to retain sufficient assets to satisfy her claim against a solvent estate, but should resign her office of administratrix if she wishes to enforce by suit her claim against an insolvent estate. While not determining in this proceeding that a similar right of retainer exists on the part of the defendant Barber town treasurer as a public officer, we see no reason why the rule requiring a similar resignation of his said office before he can maintain this action in his individual capacity is not applicable. In the one case the ultimate payment is to be made by the estate, and in the other by the town. In each case also the defendant loses the right to compensation for future services by resigning his official or representative position, so that there may be no conflict between the enforcement of private right and the duty arising from his representative position

And it is to be noted that in *Perkins v. Se Ipsam, supra*, the plaintiff was held to be without remedy by reason of failure so to resign within the sixty days prescribed for the institution of her action. In the case at bar there is no such short period of limitation and the case is within the ordinary provisions of the statutes of limitation.

In the above statement we have used language, to the effect that the ultimate payment is to be made by the town designedly. The statutes of the state still seem to impose the primary liability to pay the judgment obtained in the action brought by the express terms of the language of Gen. Laws, 1909, cap. 46, § 12, *supra*, "against such treasurer" upon the town treasurer as is evidenced by an examination of the two sections of the same chapter immediately following:

"Sec. 13. On judgment being obtained for such debt, damages or demand, in case said treasurer shall not have sufficient of the money of such town or city in his hands to satisfy and pay the judgment obtained and the charges expended in defending such suit, the said treasurer shall make application to any justice of the peace in such town or city, and thereupon the justice shall grant a warrant to the town sergeant of such town, requiring him to warn the electors of the town to hold a town meeting, at such time and place as shall be appointed, or to the mayor of such city requiring him to call a special meeting of the city council of such city, for the speedy ordering and making a tax, to be collected for the *reimbursement of said treasurer.*"

"Sec. 14. In case said electors, or said city council, as the case may be, upon due warning given them, shall not take due and effectual care to *reimburse, pay or satisfy said treasurer* the money, costs and charges by *him* expended, or recovered against *him*, upon petition, in the nature of a petition in equity, by him or by the person recovering the judgment named in section thirteen of this chapter, made to the superior court at any time thereafter setting forth the facts, the court may order the assessors of said town or city to assess upon the ratable property thereof, and the collector to collect, a tax sufficient for the pay-

ment of said judgment, with all incidental costs and charges, and the expense of assessing and collecting such tax."

It will be observed that the tax there referred to is to be collected under section 13 "for the *reimbursement* of said treasurer" in case he "shall not have sufficient of the money of such town or city in his hands to satisfy and pay the judgment," and under section 14 there is no jurisdiction in the superior court to order a tax for the payment of the judgment until after and unless the electors of a town "upon due warning given them shall not take due and effectual care to reimburse, pay or satisfy the money costs and charges by him expended or recovered against him," etc. Language could hardly be more plain than that the town treasurer is to be *reimbursed* in the amount which he has thus expended, and it needs no argument to maintain that one cannot be reimbursed unless he has first paid out, and the language of the statute is equally significant in speaking of the judgment as recovered not against the town but as "recovered against *him*."

In *Cornell Co. v. Barber*, 31 R. I. 358, at pages 367 and 368 of the majority opinion, and on pages 396 and 397 of the minority opinion, there may be found an historical account of the legislation of the colony and of the state in this respect to the present time. Ever since the enactment of the law of 1659 "that it shall be lawfull for any plaintiff against any towne in this Collony in any actionable case, to arrest the Towne Treasurer, who (beinge arrested) shall consult with the Towne or Towne Counsell, whether to compound or stand out the suite; and he shall demaund of the towne a rate to *repay* his charges and *disbursements*," etc., it will be noticed that this provision for "*reimbursement*" has remained in the statute for a period now of more than two hundred and fifty years.

Nor is there any provision of the statute for an execution against the *town* for the collection of a claim of this nature. In criminal cases of neglect to keep highways and bridges in order, the statute is explicit. Thus, by Gen. Laws, 1909, cap. 83, §§ 11 and 20, it is provided: "Sec. 11. Every town which shall neglect to keep in good repair its highways and bridges

shall be fined not less than fifty dollars nor more than five hundred dollars, and execution shall issue therefor *against such town.*" . . .

"Sec. 20. If any town adjoining such bridge shall refuse or neglect to keep in good repair the part of such bridge within and next adjoining the line of such town, the town so neglecting or refusing shall be fined not less than twenty dollars nor more than one thousand dollars, and execution shall issue for the amount of said fine and costs *against the said town*; but nothing herein contained shall be construed as to impair any agreement made between any towns relative to the supporting and repairing of bridges."

So, a town treasurer is not included in the provisions of Gen. Laws. 1909, cap. 259, § 24: "Where an instrument contains or a person adds to his signature thereto words indicating that he contracts or signs in his representative capacity as trustee, executor, administrator, guardian, or conservator, he shall not be personally liable on the instrument, if he was duly authorized to make the same in his representative capacity; and action on the instrument shall be brought *against* such trustee, executor, administrator, guardian, or conservator in his representative capacity, or *against* his successor, and execution on any judgment obtained *against* him shall run only *against* the goods, chattels and real estate of the estate in the hands and possession of such trustee, executor, administrator, guardian, or conservator, or successor, and not *against* his own property and estate: Provided, that upon a suggestion of waste as provided in section twenty-seven, chapter three hundred eighteen a writ of scire facias may be sued out *against* him in the same manner provided in said section twenty-seven, chapter three hundred eighteen and the procedure thereon shall in all respects conform thereto." See also Gen. Laws, 1909, cap. 318, § 26.

In such a case as the present there is no provision authorizing the levying of an execution upon any town property, even though not then needed for public or town purposes, such as unoccupied real estate or other town property.

- (4) The foregoing considerations clearly show that while the ultimate liability is upon the town, the primary liability is upon the town treasurer, and that at least until the town has otherwise provided and directed he has complete control of the defence, assuming always no collusion with a claimant or other lack of *bona fides* on his part. He determines what defences he will plead and how they shall be sustained; nor do we find any authority or jurisdiction over him in that behalf given by the statute to the town council. He is not their appointee
- (5) but must always be chosen by the electors of the town. (Gen. Laws, 1909, cap. 49, §§ 1 and 13.) Neither is he removable for cause by the town council, since his tenure of office is defined by section 19 of said cap. 49, as follows: "All town officers shall hold their offices until the next annual election of town officers, and thereafter until their successors shall be lawfully qualified to act; unless where it is expressly provided to the contrary." Nor has the town council jurisdiction to order the payment from the town's funds, either of the original claim or of the judgment, until the taxpaying electors have made an appropriation therefor. Whatever sum is voted by the tax-
- (6) paying electors therefor, it is his duty to pay and he is entitled to receive in "reimbursement" of a judgment paid by him whether the same be sanctioned or repudiated by the town council.

We are accordingly of the opinion that the present action cannot be maintained while the plaintiff is also the defendant primarily liable to satisfy the judgment and the order must be.

Case remitted to the Superior Court with direction to dismiss this action.

Mumford, Huddy & Emerson, for plaintiff.

Charles C. Mumford, of counsel.

Lester T. Murphy, for defendant.

GEORGE PELOSO vs. HENRY N. FRANCIS, *et al.*

MARCH 31, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Certiorari. Intoxicating Liquors. Parties. Liquor Licenses. Technical Objections.*

On certiorari against license commissioners by a holder of a liquor license, unless the license held by petitioner is affected by the issuance of a subsequent license granted to another, petitioner has no cause of complaint. As a citizen or holder of a liquor license, he has no concern with other licenses or applications and cannot raise technical objections to the same. It is the province of the attorney general to represent the public.

(2) *Liquor Licenses. Several Licenses for Same Premises.*

While petitioner was the holder of a valid and subsisting license for the sale of intoxicating liquors, the license commissioners issued another liquor license for the same premises to another person.

Held, that the rights and privileges of the petitioner were not affected by such action, since neither license operated to put licensee in possession of the premises, nor were the laws concerning rights in real estate or the relation of landlord and tenant affected by the issuance of such licenses.

CERTIORARI. Heard on petition for writ and denied.

PER CURIAM. This is a petition for a writ of certiorari against the mayor and the city council of the city of Cranston, as a board of license commissioners, and others, setting forth *inter alia* that the petitioner "is the present lawful owner and holder of a first class license to sell pure, spirituous, intoxicating and malt liquors at 133 Chestnut Hill Avenue, in said Cranston, which license was granted to him upon the payment of the lawful fee therefor, on the twelfth day of December, A. D. 1910, for a period ending on the first day of December, A. D. 1911." That on the seventeenth day of March, 1911, said board of license commissioners issued to the Empire Bottling Company, a corporation, a similar first class license to sell intoxicating and malt liquors at said premises numbered 133 Chestnut Hill avenue in said Cranston. That on said seventeenth day of March before the granting of said license, said petitioner filed his remonstrance to the granting of said last named license with

said board, setting forth his reasons for objecting to the granting of the same, principally because he was and is the owner of the license hereinbefore mentioned as first granted to sell liquor upon said premises, and also because the application for the license granted March 17, 1911, was insufficient, that the advertisement was defective, and that the corporation had not been organized either at the time of the making of said application for a license or at the time of the granting thereof. That the board of license commissioners disregarded his objections and granted the license, whereupon he filed this petition.

The petition and the hearing had upon the same disclose no ground upon which the petitioner is entitled to relief, unless the license already granted to him is affected by the issuance of the license subsequently granted to the Empire Bottling Company, he has no reason to complain. As a citizen of Cranston or holder of a liquor license therein, he has no concern with other licenses or applications made for the same. It is not his province to raise technical objections to the same. He does not represent the public; that is the province of the attorney general. We therefore disregard the technical objections made to the issuance of the license complained of.

The petitioner claims and the respondents admit and we find, that the license issued to him is valid and subsisting, in full force and effect, and unless forfeited for breach of statutes, may so remain, at the option of the petitioner, until it expires by its own limitation. This being so, nothing that the board of license commissioners of the city of Cranston may do can affect its legality or vitality. The issuance of another first class liquor license for the same premises to another person, natural or artificial, does not diminish the rights or privileges of the first licensee under his license. Neither license operates so as to put either licensee in possession of the premises therein referred to, neither can it so operate as to dispossess either person of the same. The laws concerning the conveyance of real estate and rights therein are not affected by the issuance of licenses, nor are the relations of landlord and tenant changed, excepting by the special provisions of the statutes relating to

the sale and keeping of intoxicating liquors, nuisances and kindred subjects, by the fact that a tenant is granted a license. We do not see why in the case of two parties contending for the possession of certain premises, suitable to be licensed, who were willing to risk their money for such a purpose, a board of license commissioners might not grant a license to each, provided that the number of licenses granted did not exceed that allowed by law, leaving the contestants to obtain possession of the disputed premises according to law. In such a case the first licensee would have no ground to complain that the second license was about to be granted to his competitor. Nor can we see how the petitioner has any right to complain. If he is in possession of the premises, his license permits him to sell liquors there under its provisions. If he is not in possession of the premises, he can not exercise the privileges of his license therein; but, as it is possible that he may regain possession of the premises before the expiration of his license, he may be able to resume business under the same. In any event this proceeding is not brought and is not adapted to be used for the purpose of determining the rights of parties to possession of disputed premises. We cannot even consider such a proposition.

As the complainant has not shown that he has been injuriously affected by the action of the board of license commissioners of the city of Cranston in granting the license in question to the Empire Bottling Company, the complainant's petition must be denied and dismissed.

Richard W. Jennings, Benjamin W. Grim, for petitioner.

Henry A. Palmer, James A. Williams, for respondents.

ATLANTIC MILLS v. THE SUPERIOR COURT.

APRIL 21, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Pleading. Amendment. Entry of Judgment.*

After a demurrer had been sustained on substantial grounds, April 21, 1908, plaintiff did not except to such decision, but on June 30, 1908, moved to amend the declaration.

Held, that, the court had authority in its discretion to permit such amendment before the entry of judgment.

(2) *Amendment. New Cause of Action. Statute of Limitations.*

Where an amendment to a declaration does not state a new or a different cause of action than the one originally and insufficiently declared upon, but is merely a more detailed explanation of a fact stated in the original declaration, the superior court has discretion to permit the amendment, although the period of the statute of limitations has elapsed.

Blodgett, J., dissents.

CERTIORARI. Writ abated.

DUBOIS, C. J. The petitioner has brought the following petition for writ of certiorari.

"The Atlantic Mills, a corporation organized under the laws of the State of Maine, and which formerly carried on business in Providence, in the county of Providence, in said State of Rhode Island, brings this, its petition for a writ of certiorari, to the Superior Court for said Providence county, and thereupon shows:

"(1) That heretofore, to wit, on the 7th day of February, A. D. 1899, John Kolinova, of said Providence, was employed by the petitioner in its factory at said Providence, and while so employed he suffered personal injuries while operating a machine in one of the departments of said factory.

"(2) Thereafterwards, to wit, on the 15th day of December, A. D. 1904, said John Kolinova brought suit against your

petitioner in the common pleas division of the Supreme Court for said Providence county, for the purpose of recovering from your petitioner damages for the said injury by him sustained.

"(3) In said suit issue was duly framed and it was tried to a jury in the Superior Court on the 2nd day of January, A. D. 1907. On the third day of January, A. D. 1907, at the close of the testimony for the plaintiff the Justice there presiding, on your petitioner's motion, granted a non-suit. Said John Kolinova took no further steps in said suit, and thereafterwards in due course a judgment of non-suit was entered in favor of your petitioner and against said John Kolinova.

"(4) Thereafterwards, to wit, on the 18th day of December, A. D. 1907, by writ issuing from said Superior Court for said Providence county, said John Kolinova commenced another suit against your petitioner to recover damages for his said injuries, and in due course said last mentioned writ and declaration were entered in said Superior Court, and the record thereof is No. 23821 on the records of said Superior Court. Your petitioner demurred to said declaration on substantial grounds, and on April 21, A. D. 1908, after argument on said demurrer, said Superior Court sustained the same.

"(5) Said John Kolinova did not take or file any exception to said decision of said Superior Court sustaining said demurrer, and he did not prosecute a bill of exceptions to this Honorable Court for the purpose of reversing said decision, and no motion operating as a stay of judgment was filed in said suit and there was no express order of said Superior Court for the entry of said judgment on any day whatever; but on the 30th day of June, A. D. 1908, said John Kolinova did file in said Superior Court a motion to be permitted to amend his said declaration; and on July 6, 1908, after hearing upon this motion, and over your petitioner's objection, said Superior Court granted said motion.

"(6) Thereafterwards, to wit, on the 10th day of July, A. D. 1908, your petitioner moved said Superior Court for a rehearing of said motion to amend, and for the disallowance thereof and after hearing on said last mentioned motion, to wit, on the 27th

day of August, A. D. 1908, said Superior Court refused and denied the same.

"(7) Your petitioner now alleges that said Superior Court erred in permitting said amendment to said declaration, under the circumstances above set forth, for the reason that under the statute in such case made and provided judgment had, or ought to have been entered for your petitioner, and it was then too late to permit said amendment.

"Wherefore your petitioner prays that this Honorable Court issue its writ of certiorari ordering said Superior Court to certify its records relating to said amendment to said declaration in the suit commenced against your petitioner by said John Kolinova by writ issuing from said Superior Court on the 18th day of December, A. D. 1907, and all records bearing thereon; that they may be presented to this Honorable Court to the end that the same, or so much thereof as may be illegal, may be quashed.

"Causes of error:

"(1) The granting of said motion to amend said declaration was erroneous and illegal.

"(2) The refusal of said Superior Court to grant your petitioner's motion for a rehearing and for the dismissal of said motion to amend said declaration was erroneous and illegal.

"(3) That under the statute judgment was, or ought to have been, entered for your petitioner on the 7th day following the day of the decision on said Demurrer, and the said motion to amend said declaration was too late, and said Superior Court had neither power, right nor jurisdiction to grant the same."

After hearing the said petition this court entered the following rescript:

- (1) "A majority of the court is of the opinion that the Superior Court had authority in its discretion to permit the plaintiff in the case of *Kolinova v. Atlantic Mills*, to amend his declaration under C. P. A. § 261, now Gen. Laws, 1909, cap. 285, § 4, before the entry of judgment in the case, upon motion. But inasmuch as the question is also raised, as to whether the Superior Court had jurisdiction to allow an amendment to the

declaration in matter of substance, after the period of the statute of limitations had elapsed, this question cannot be determined except upon comparison of the original declaration with the amended declaration.

"Therefore the petition of said Atlantic Mills for a writ of certiorari should be granted and the writ will issue accordingly, in order that this court may be fully advised as to the nature and extent of the amendment.

"The case will stand for hearing upon the question above suggested."

The writ accordingly issued and the papers in the case of *John Kolinova v. Atlantic Mills*, were transmitted to this court. Among them we find the following rescript which sets forth the reasons which led the presiding justice of the Superior Court to sustain the defendant's demurrer to the plaintiff's declaration:

"The declaration alleges that as a laborer employed by the defendant, it was the plaintiff's duty to remove from and restore to a certain machine in the defendant's establishment certain rolls or shells; that in order to remove said rolls it was necessary to stop the motion of the machine; that attached to said machine was a lever; that if said lever was moved in one direction the motion of the machine was stopped, and if said lever was moved in the opposite direction the machine was set in motion; that on the day of the occurrence complained of the plaintiff was engaged in removing from and restoring to said machine said rolls; that said lever, when moved in such a manner as would normally have stopped the motion and operation of said rolls or shells, returned to its original position with the result that said rolls or shells suddenly resumed their motion and operation.

"This does not state a case of emergency which would excuse on the part of the plaintiff a momentary forgetfulness of the unprotected condition of the gearing on said machine or the neglect of due care for his own safety. If, as the court understands, the plaintiff alleges that the shipper when placed in a position to stop the machine automatically returned to its former place and started the machine, this was a defect in the machine and if this defective action of the machine produced

a condition of sudden danger to the plaintiff or of threatened injury to others or to the property of the defendant, to avert which very rapid action was demanded of the plaintiff, that would present an instance of emergency, perhaps excusing the exercise of ordinary presence of mind and care on the part of the plaintiff.

"As to remove the rolls it was necessary that the machine should be at rest, in order to continue his labor it was necessary for the plaintiff to again throw off the shipper, but there is nothing in the circumstances alleged that shows any necessity for haste or that presents any different condition than when the shipper is ordinarily thrown off on the instant when required.

"If there was no condition creating an emergency when the machine automatically started, the allegation with regard to the sudden appearance of steam does not create such an emergency. If by reason of the presence of steam the plaintiff could not see the machine, gears or lever, the condition is not different from that of the sudden extinguishment of lights in a mill operated at night. When the lever was obscured the plaintiff should have arrested the motion of his hand or should have proceeded with the caution required by the new condition.

"Demurrer to declaration sustained."

It also appears from an inspection of the amended declaration that the amendment is accomplished by the addition of the following clause to each count of the declaration: "That the said plaintiff was then and there caused by said outburst of steam in manner aforesaid to suddenly and involuntarily shift the position of his body with the result that his said hand, instead of being withdrawn in the same line in which it had been projected was drawn by the said involuntary shifting of his body across said gearing apparatus of said machine." This amendment is in terms an amendment in matter of substance and it does not purport to be merely formal. However, it does not state a new cause of action or a different cause of action than the one originally and insufficiently declared upon. The defendant was notified by the original declaration that the plaintiff sought to excuse his apparent contributory negligence in getting his

hand caught in the uncovered gearing whereof he had knowledge by setting up an emergency created by the sudden and unexpected outburst of steam. The plaintiff continues to rely upon the emergency but enters into a more detailed and amplified explanation of the cause and effect of the same. He now sets out with more particularity the manner in which the steam operated not only to confuse and blind him but to cause him to assume a position which without his knowledge or consent and against his will was more dangerous than he had any reason to suppose or expect and in which he had less opportunity to protect himself than he otherwise would have had.

In these circumstances we are of the opinion that no new cause of action is presented by the amendment and that the action of the court in permitting such amendment to be made was within its discretion under the provisions of the statutes hereinbefore referred to.

For these reasons the writ of certiorari is abated.

BLODGETT, J., dissenting. The demurrer to the original declaration in this case was sustained as substantial by the Superior Court and no exception to that ruling was taken by the plaintiff, nor is the correctness thereof now questioned. The fourth ground of said demurrer was as follows: "It does not appear by any of the counts in said declaration that the plaintiff has any cause of action against this defendant." The effect in law of the decision sustaining said demurrer was to determine that the plaintiff had not stated any cause of action, and that the defendant was not bound to answer in any way the allegations of the declaration. Both these questions have thus been judicially and conclusively determined by a competent tribunal and constitute the law of this case. If the amendment to the declaration now states a cause of action, a cause of action is thus stated for the first time. Heretofore it has been in law as though a blank declaration or no declaration had been filed. Consequently it is as if a declaration were now filed and a cause of action stated for the first time and after the statute of limitations has confessedly run. If the amendment now sets forth no cause of action its allowance is obviously futile.

For these reasons I am unable to agree with the opinion of the majority of the court.

Comstock & Canning, Patrick P. Curran, for petitioner.

James J. McCabe, for respondent.

OWEN MCPARLIN vs. JAMES THOMPSON, *et al.*

APRIL 28, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Mechanic's Lien. Commencement of Legal Process.*

Pub. Laws, cap. 696, § 4 passed March 21, 1888, provided that no person who shall do work for or furnish materials to be used in the construction, erection or reparation of any building, etc., without written contract, shall have any lien therefor unless he shall commence legal process for enforcing the same, within six months from the time of the commencing the doing of such work, or of the commencing the delivery of materials, if payment for the same shall not then be made.

Materials were delivered under an entire contract made November 14, 1894, and delivery began November 15, 1894. Legal process was commenced June 5, 1895.

Held, that this was not a compliance with the statute, which being in derogation of common law right must be construed strictly.

MECHANIC'S LIEN. Heard on appeal from decree of superior court and decree reversed.

PER CURIAM: It appears from the testimony of the petitioner that the materials for which he claims a lien were delivered under an entire contract made November 14, 1894, and that delivery thereunder began November 15, 1894. Legal process for the enforcement of the lien was commenced on the fifth day of June, 1895. As this was more than six months from the time of the commencing the delivery of materials, it was not a compliance with the provisions of the statute governing the same, Pub. Laws, R. I. cap. 696, § 4, passed March 21, 1888, which is necessary for the enjoyment of its privileges. The statute being in derogation of common law right must be

construed strictly. The account or demand was therefore lodged too late to secure the lien. *Gurney v. Walsham*, 16 R. I. 698 and cases cited.

The decree of the Superior Court is therefore reversed and the case is remanded to the Superior Court with direction to enter a decree dismissing the petition with costs.

Fitzgerald & Higgins, John E. Connolly, for complainant.

C. J. Farnsworth, for respondents.

AMERICAN ELECTRICAL WORKS vs. JOHN DEVANEY.

APRIL 28, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Special Appearance. Jurisdiction.*

A party filing a special plea or motion does not submit to the jurisdiction of the court and thereby waive his special plea, when such plea being overruled, he excepts and proceeds to a trial upon the merits. After verdict, he can again in the appellate court insist upon his plea to the jurisdiction.

(2) *Service of Writ of Summons.*

Service of a writ of summons upon a manufacturing corporation was made as appeared by the return by leaving a copy of the writ with the secretary of the defendant.

Held, that, as under the provisions of C. P. A., § 526 (now Gen. Laws, 1909, cap. 300, § 4) service of a writ of summons upon the secretary of a corporation as such, can only be made when the action is against a bank or insurance company, and no other valid service appeared from the return, there was no legal service of the writ.

(3) *Service of Writs. Acts of Incorporation. Judicial Notice.*

Gen. Laws, 1909, cap. 32, § 15 provides that "every act of incorporation shall be so far deemed a public act that the same may be declared on and given in evidence, without specially pleading the same." The court taking notice of an act of incorporation which provides that the corporation shall have a place of business in a designated city will assume that it has complied with this requirement, thus showing that where service of a writ was made upon the company in another town that such service was not at the office of the company.

(4) *Equity. Injunction Against Action at Law. Adequate Remedy.*

Upon a bill in equity brought to enjoin further proceedings in an action at law where service of the writ is alleged to have been defective, it appearing that

complainant appeared specially in such action only to contest the jurisdiction and there excepted to the denial of its motion to dismiss the writ, all of its rights are reserved if the action is sought to be further prosecuted and the bill will be dismissed.

BILL IN EQUITY on facts stated in opinion. Heard on appeal of complainant from decree dismissing bill and affirmed.

BLODGETT, J. This is an appeal from a decree entered by the Superior Court sustaining the demurrer of the respondent to the bill of complaint and adjudging that the bill of complaint be dismissed.

The allegations of the bill are in substance that on or about February 27, 1907, the respondent commenced an action at law in the Superior Court against the complainant by writ returnable March 12, 1907, and placed the writ in the hands of the sheriff of Providence county for service; that March 1, 1907, one Maurice A. Murray, being then a deputy sheriff in Providence county, made a pretended service of the writ by leaving a true and attested copy of the same with one John E. Hayward in his hands and possession and thereafter, on the same day, made the following return: "At East Providence in the county of Providence, on this 1st day of March, A. D. 1907, I have made service of the within writ by leaving a true and attested copy of the same with Secretary of the said defendant corporation in his hands and possession." That said Hayward was not, on March 1, 1907, the secretary of the complainant and was not an officer, agent or employee of the complainant; that no service other than said pretended service was made of the writ and no service of the writ has ever been made upon the complainant or upon any officer, agent, attorney or servant of the complainant.

That the respondent filed the writ with the aforesaid return thereon in the office of the clerk of the superior court, together with the declaration and that after the entry of the cause by the respondent and within the time within which the complainant, if it had been served with the writ, might have demurred or pleaded to the declaration, complainant entered its special appearance in the action at law "for the sole purpose of object-

ing to the jurisdiction of the Superior Court over it in said cause," and at the same time complainant filed its motion that said cause be dismissed for want of jurisdiction arising from the fact that no service of the writ had been made upon the complainant, and that thereafter a hearing was had upon the motion at which the facts with reference to the pretended service of the writ were made to appear and without contradiction and thereafter the motion to dismiss was denied and the complainant caused its exception to the ruling dismissing the motion to be duly noted.

That no further proceedings were had in the action at law until October 24, 1908, when an order was made that the pleadings in the cause be closed on or before November 13, 1908; that the complainant has not entered an appearance in the action at law other than the aforesaid special appearance and is not subject to the order and jurisdiction of the Superior Court in that cause.

That the respondent has threatened and threatens to cause the action at law to be defaulted as against the complainant, to have damages assessed upon default, and to cause judgment to be entered against the complainant for the amount of the damages so to be assessed, and that it is the intention of the respondent, having obtained said judgment, to sue out execution upon the judgment and to cause the execution to be levied upon the property, both real and personal, of the complainant and to sell said property under and by virtue of such execution.

That any judgment so obtained against the complainant would be void and of no effect and that any sale upon an execution so obtained or so issued will be void and of no effect and that the purchaser at any such execution sale will acquire no title to complainant's property but that a pretended title acquired at any such execution sale will be a cloud upon the complainant's title to its said property.

The prayer of the bill is for a permanent injunction from further proceedings in the action at law above mentioned and for general relief.

The defendant has demurred to the bill for want of equity and

contends that the complainant has a complete and adequate remedy at law. The defendant's contention is thus expressed on his brief:

"The remedy at law is adequate. The record of the law case of John Devaney v. American Electrical Works shows that at an early stage in the proceedings in that case this complainant who was there the defendant, filed a special appearance and a motion to dismiss: further, on motion of this respondent, who was there the plaintiff, a hearing was had on the question of the right of this complainant to controvert the statements made in the officer's return, which was the basis of the motion to dismiss. On decision being rendered in favor of John Devaney, exception was duly taken and noted for this complainant, so that by pursuing the ordinary course in the case at law, a decision could be had by this court upon the aforesaid exception.

- "The complainant's counsel may object that in order to bring his exceptions before this court, he must under our practice, proceed to a trial upon the merits and by so doing would submit to the jurisdiction of the court. The respondent
- (1) respectfully submits that such is not the case. A party filing a special plea or motion does not submit to the jurisdiction of the court and thereby waive his special plea, when his special plea being overruled, he excepts and proceeds to a trial upon the merits. After verdict, he can again in the higher court, insist upon his plea to the jurisdiction."

We are of the opinion that the defendant's contention in this respect is correct.

In *Harkness v. Hyde*, 98 U. S. 476, the writ was served on the defendant outside the bailiwick of the sheriff and without the jurisdiction of the court. The travel of the case is thus stated by Mr. Justice Field: (p. 477) "The defendant thereupon appeared specially by counsel appointed for the purpose, and moved the court to dismiss the action, on the ground that the service thus made upon him on the Indian reservation was outside of the bailiwick of the sheriff, and without the jurisdiction of the court. Upon stipulation of the parties, the motion was

adjourned to the Supreme Court of the territory, and was there overruled. To the decision an exception was taken. The case was then remanded to the district court, and the defendant filed an answer to the complaint. Upon the trial which followed, the plaintiff obtained a verdict for \$3,500. Upon a motion for a new trial, the amount was reduced to \$2,500; for which judgment was entered. On appeal to the Supreme Court of the territory, the judgment was affirmed. The defendant thereupon brought the case here, and now seeks a reversal of the judgment, for the alleged error of the court in refusing to dismiss the action for want of jurisdiction over him." And the decision of the court was as follows (p. 479): "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.

"The judgment of the Supreme Court of the Territory, therefore, must be reversed, and the case remanded with directions to reverse the judgment of the District Court for Oneida County, and to direct that court to set aside the service made upon the defendant; and it is so ordered."

The respondent further demurs, on the ground that the bill seeks to impeach the return of the officer on the writ, and both the complainant and the respondent have argued the cause as though that were the question to be determined and were decisive of the demurrer. Both parties seem to have over-

looked the very apparent and fatally defective nature of the return. Even if the return were not questioned it is evident that it does not comply with the statutory requirements, and that it does not show even upon its face any legal service of the writ.

The statute in force at the time of the alleged service of the writ in question was C. P. A. § 526, as follows: "A writ of summons shall be served by reading the same to the person to be summoned, or by leaving an attested copy thereof with him or at his last and usual place of abode with some person living there; or, if such writ be issued against any company incorporated under the laws of this state, by leaving an attested copy of such writ, if a bank, with the cashier, treasurer, or secretary thereof; if an insurance company, with the president or secretary thereof; and if any other company incorporated under the laws of this state, with the treasurer thereof, or with the agent or superintendent thereof, or with the person executing the duties of treasurer thereof, or at the office of such corporation with some person there employed, or if it have no such officer or office within this state then the same may be served by leaving an attested copy thereof with any stockholder or member of such corporation, or service may be made in such other mode as the charter of such corporation may prescribe: *Provided*, that in actions for recovery of tenements let or held at will or by sufferance, service of a writ of summons may be made by personal service as above prescribed or by posting an attested copy thereof on the main door of the premises. And when a writ of summons shall be issued against a foreign corporation doing business in this state, it shall be served by leaving an attested copy thereof with any clerk or agent in this state of such corporation, or with the attorney of such corporation appointed under the law upon whom service may be made as against such corporation."

It will be seen that service on a "secretary" as such can only be made when the action is brought against a bank or an insurance company. It does not appear that the "secretary" referred to in the return was the treasurer of the corporation,

or "the agent or superintendent thereof" or "the person executing the duties of treasurer thereof," Neither does it appear that the writ was served "by leaving an attested copy of such writ," . . . "at the office of such corporation with some person there employed." Indeed, the return shows that the writ was served in the town of East Providence, although without specifying the name of the person alleged to be the "secretary" of the defendant corporation. Gen. Laws, 1909, cap. 32, § 15, is as follows: "Every act of incorporation shall be so far deemed a public act, that the same may be declared on and given in evidence, without specially pleading the same." An examination of the act "To Incorporate American Electrical Works," passed June 2, 1882, discloses no special method of service of process upon this corporation provided by its charter, but does disclose the following requirement: "Sec. 5. Said corporation shall have a counting-room or place of business in the city of Providence." We must assume that the corporation has complied with this statutory requirement in which case it affirmatively appears that the service of the writ was not made at the office of the corporation. Doubtless if these defects had been brought to the attention of the Superior Court the action would have been dismissed for lack of jurisdiction, owing to lack of due and legal service of the writ.

Inasmuch as the complainant has appeared specially in the action at law and only to contest the jurisdiction and inasmuch as it has duly excepted to the denial of its motion to dismiss the writ, all its rights are reserved if the action is sought to be further prosecuted and the decree dismissing the bill must be affirmed, though for a different reason than the reason given by the court below.

Appeal dismissed and decree dismissing bill affirmed.

C. M. Van Slyck, Frederick A. Jones, for complainant.

John H. Slattery, for respondent.

CHARLES PERRY, Trustee, vs. D. B. HALL *et al.*

MAY 11, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Trusts. Support of Beneficiary.*

Testamentary bequest directed trustee to collect the income, and after payment of expenses, to pay over the same to wife of testator, with power, when in his judgment necessary and proper for the comfortable support of the wife, to sell so much of the trust estate as might be necessary and apply the proceeds to "her support in comfort during her life, and after her decease to convey any of the trust property remaining in his hands unexpended to such persons as at my wife's death shall be my next of kin."

Upon the question whether after decease of widow the trustee had authority to apply the trust property in satisfaction of a claim for board, nursing, attendance, medicine and medical services furnished to the widow prior to her decease, whether or not authorized by the trustee:—

Held, that the manifest purpose of the will being to make suitable provision for the comfortable support of the wife, the whole trust estate stood pledged for such purpose, and the trustee would be in the exercise of his rights by discharging the obligations incurred for such support, provided, in case he did not authorize such charges, that they were reasonably appropriate for her comfortable support.

(2) *Vesting in Possession. Trusts.*

Held, further, that there was no immediate vesting in possession of the interest of the next of kin upon the death of the wife, but the act of the trustee was necessary to convey the trust property to the next of kin.

(3) *Trusts. Appropriation of Fund.*

Held, further, that there was an appropriation of a fund for a specific purpose with a designation of a class of persons with capacity to receive upon the happening of an event, the persons who might take and the amount they would take being contingent, and in no sense a remainder.

(4) *Discretionary Power under Trust.*

Held, further, that the question as to the duration of a discretionary power under a trust is one of intention evidenced by the whole instrument containing the power. Such power remained in the present succeeding trustee, and he was still authorized to sell sufficient of the trust estate to defray the ex-

penses incurred for the comfortable support of the widow to the same extent that he would have been authorized by the trust to provide her support in comfort during her life.

BILL for instructions on facts fully set forth in opinion.

BLODGETT, J. This is a bill for instructions brought by the complainant as trustee under the will of W. Frank Hall, late of the town of East Greenwich, who deceased leaving a last will and testament which was duly probated on the 31st day of July, 1875. The will, after making provision for the payment of debts and charges against his estate and a specific bequest of one thousand (1,000) dollars, disposed of all the rest, residue, and remainder of his property in trust as follows:

"2d. All the rest residue and remainder of my property of whatever kind or nature of which I shall die possessed or in any way entitled to I give devise and bequeath unto Nathan F. Dixon Sr. of Westerly his heirs and assigns forever in trust for the following purposes to collect the income from time to time as it becomes payable and after deducting all expenses incident to the trust including a reasonable compensation for his services to pay over the same to my wife Dorcas B. Hall for her sole use and benefit and in further trust whenever in his judgment necessary and proper for the comfortable support and maintenance of my said wife to sell and dispose of the trust estate in his hands or so much thereof as may be necessary and apply the proceeds, as far as necessary, to her support in comfort during her life and in further trust after her decease to convey any of the trust property remaining in his hands unexpended to such persons as at my wife's death shall be my next of kin according to the Statutes of distribution then in force in the State of Rhode Island such persons to take in the proportions prescribed by such Statutes. And I further authorize my said trustee whenever necessary or advantageous in his judgment to sell and dispose of any of the property of the trust for the purpose of better investment and to invest the proceeds of such sales and all other moneys belonging to the trust fund not required to be expended by the previous provis-

ions of this trust, in safe and profitable stocks bonds or mortgages, to be held under the same trusts and with the same powers as the original fund."

"1st page 2d line from bottom word 'undistributed' erased and 'unexpended' inserted before signing."

Nathan F. Dixon, Sr., qualified as trustee and acted until his decease. Thereafter Nathan F. Dixon, Jr., was duly appointed and qualified as trustee and acted as such until his death. In January, 1898, the complainant, Charles Perry, was duly appointed and qualified as trustee and has since then discharged the duties of trustee.

Dorcas B. Hall, the widow of the testator, deceased at Providence on the 5th day of October, A. D. 1908, and all the persons named in this bill, excepting D. B. Hall, are alleged to have been the next-of-kin of the testator at the death of said Dorcas B. Hall, according to the Statute of Distribution then in force in the State of Rhode Island.

The estate which passed to the trustee under the terms of this will was wholly personal property: and in the exercise of the powers conferred on the trustee, the corpus of the estate, as well as the income, has been largely drawn upon for the support and maintenance of the testator's widow, Dorcas B. Hall.

On the 5th day of November, A. D. 1908, the respondent, D. B. Hall, presented to the trustee his bill for board, nurses' board, attendance of nurse, attendance of servants, medicine and medical attendance furnished by him to the said Dorcas B. Hall, widow of the testator, between June 16, 1906, and October 5, 1908, including therein support and maintenance, medical attendance, etc., to said Dorcas B. Hall for and during her last illness.

The complainant, admitting that he had trust property of greater value than the amount of said bill, but expressing a doubt as to his authority to apply the trust property, or any portion thereof, in satisfaction of this claim (the next-of-kin claiming distribution without regard to the payment of said claim), has brought this bill in equity joining all these alleged

next-of-kin and this respondent to determine his authority and duty in the premises.

The respondent, D. B. Hall, making answer to said bill, among other things, asserted that the complainant, as trustee under the will of W. Frank Hall, was at all times possessed of sufficient property and effects to provide for the comfortable support and maintenance of said Dorcas B. Hall, and that during the life of said Dorcas B. Hall, he, said trustee, approved and sanctioned the provisions made by said respondent, D. B. Hall, as necessary and proper for the support and maintenance of said Dorcas B. Hall in comfort; and directed and instructed the said respondent D. B. Hall to continue to furnish and supply her needs and look after her and attend to the payment of her bills and that he, said trustee, would see that the said respondent, D. B. Hall, was reimbursed, and paid therefor. He further avers that said trustee did not otherwise provide for the necessary support and maintenance of said Dorcas B. Hall, and that said D. B. Hall was cognizant of the interest which said Dorcas B. Hall had as beneficiary under said last will and testament of said W. Frank Hall, deceased, and, in reliance upon said approval, sanction, direction, and instruction of said trustee and his promise to pay as aforesaid, the said respondent, D. B. Hall, furnished the supplies and accommodations and made the payments and outlays charged for by said D. B. Hall and sent his bill therefor to the complainant as requested by the latter.

Upon a consideration of this bill and answer, the Superior Court has certified to this court the following question of law: "Under the will of W. Frank Hall, hereto annexed, is the trustee, after the decease of the testator's widow, empowered to apply the trust property, or any portion thereof, or the proceeds of any sale thereof, to the payment of board, nurses' board, attendance of nurses, attendance of servants, medicines, medical attendance, etc., furnished to the said widow prior to her decease either

"(a) if the trustee did not authorize the furnishing of the said board and other items, or

“(b) if the trustee expressly authorized and directed the furnishing of the said board and other items?”

- (1) The manifest purpose of the will is to make suitable provision for the comfortable support and maintenance of his wife. The entire estate is placed under the control of the trustee for that purpose, the corpus of the estate as well as its income. He practically placed the trustee in his own shoes giving him all the control of his entire estate to be used for this purpose and used as generously and unreservedly as he would himself use it for the proper care of his wife. The carrying out of that desire was apparently the dearest wish of the testator, as well as the only continuing purpose expressed in his will. The testator's estate was given to the trustee, his heirs and assigns forever for the sole use and benefit of the wife, to support and maintain her comfortably with authority to sell and dispose of the trust estate in his hands, or so much as might be necessary, and apply the proceeds to this purpose. The proper exercise of this power involves the whole of the trust property, and the authority of the trustee is commensurate with that power and duty. It extends to the wife's needs and necessities, to her support in comfort, and is exhausted only after being so applied. The whole trust estate stands pledged for her comfortable support and maintenance. The trustee is not appointed as guardian of her person and estate. It is not a prerequisite to get the benefit of this trust that the money must first have been apportioned and turned over to her use. She might, very properly, under the terms of this instrument have her comfortable support and maintenance and the trustee would be in the exercise of his proper rights by discharging the obligations incurred for such support and maintenance.

The will also provides, “and in further trust *after* her decease to convey any of the trust property remaining in his hands *unexpended* to such persons, etc.”

- (2) The will, therefore, by its terms clearly shows that there is no immediate vesting in possession of the interest of the next-of-kin upon the death of the wife. The estate still continues in the trustee and his heirs “in further trust *after* her decease

to convey." The will by its terms shows that the act of the trustee is necessary to convey the trust property to the next-of-kin. The trustee has the legal title to the trust estate, and until he makes such conveyance the next-of-kin cannot be said to have the legal title: until then their estate does not vest in possession. A test which may be suggested is: Supposing the trust property to have come into the custody of a third person who wrongfully refused to give it up,—who could maintain trover? The answer would seem to be that only the trustee could maintain such action. The next-of-kin in order to get the legal title in them must have a conveyance from the trustee; and if he declined to convey the next-of-kin would have to resort to a court of equity to compel the trustee to convey. Until that conveyance is made by the trustee upon his own act, or under order of a court of equity, the next-of-kin have no title that would avail them in a court of law.

If, as shown above, the testator practically placed the trustee in his own shoes to the full extent of the estate bequeathed for the purpose of supplying in a comfortable manner support to his wife, then it follows that the duty of the trustee is not discharged until he pays the obligations incurred in furnishing her comfortable support, to the extent of the estate which came into his hands.

Under the first question certified to the Court: if the trustee did not authorize the furnishing of the board and other items charged—the important question is: Were the board and other items furnished reasonably appropriate for the comfortable support and maintenance of the wife?

In this connection it is submitted that there is nowhere before the court any suggestion that the board and medical attendance, etc., furnished were not reasonably necessary for the wife. There is no plea or averment that the trustee had otherwise made provision for the comfortable support and maintenance of the wife during the period covered by this claim; on the other hand there is the express averment in the answer to the bill filed that the trustee did not otherwise provide for the comfortable support and maintenance of the

wife. If the entire trust estate is pledged to this purpose and what was furnished was only furnished in the accomplishment of that purpose, there can be no injustice in using the estate to pay the claims necessarily arising. Surely a trustee could not be permitted by collusion with the next-of-kin to deprive the wife of her proper support and maintenance and thereby enhance the value of the estate which came to the next-of-kin. He could not by his bad faith or collusion destroy the purpose of the trust. It is equally true that he could not in good faith destroy the purposes of the trust. The trustee knew that the widow was entitled, under the terms of the trust, to the very things which said D. B. Hall furnished her. He must have known that, not supplying these things himself, either the widow was not receiving the support to which she was entitled under the terms of the will, or that somebody else was supplying that support and, as the fund was pledged to this purpose, it was a matter of indifference to him whether these things were furnished upon his order in the first instance or paid for by him from the trust fund after they had been furnished. It was sufficient for him that the wife was receiving the comfortable support provided for her by her husband's will, and for the furnishing of which the whole estate, if necessary, was liable.

- (3) In the case before the court there is an appropriation of a fund for a specific purpose. There is no remainder resting upon a life estate. There is merely a designation of a class of persons with capacity to receive upon the happening of a certain event; who they are that will receive is contingent, depending upon their being alive at the death of Mrs. Hall, and upon their being of the next-of-kin of W. Frank Hall as fixed by the statutes of distribution then in force in the State of Rhode Island. The persons who may take and the amount they will take are contingent. It might be persons who were not born at the time of the death of W. Frank Hall. It might be because of a change in the statutes that those who were of the next-of-kin at the time of his decease would not be within this class by the statute in force at the time of the death of his

wife. There might be something to take of the estate and there might be nothing. The trust clearly provides that simply what is *unexpended* shall be distributed within that class. In the case at bar the interests of the next-of-kin of W. Frank Hall are in no sense a vested remainder, in fact they do not take by remainder at all, but whatever their interest may be it is highly contingent. Who they are is not ascertainable at the beginning of the trust (or what might be spoken of as the beginning of the life estate), but at the end of a life then in being, the life of Dorcas B. Hall, the wife. They may be those who were not in being at the beginning of the trust. There may be a new class added to the next-of-kin or some who were within the class at the time the trust began may not be within the class at the death of the wife, because the will limits it to the next-of-kin at the death of the wife according to the statutes of distribution then in force in Rhode Island.

It is further dubious in that there may be something and there may be nothing for them to take inasmuch as the will provides that the trustee shall convey to them "any of the trust property remaining in his hands unexpended."

- (4) Counsel for certain respondent heirs-at-law, who oppose the power of the trustee now to make sale for the payment of the expense of supporting Dorcas B. Hall in her lifetime, have stated on their brief "the question as to the duration of a discretionary power under a trust is one of intention, evidenced by the whole instrument containing the power." With that statement we agree and are clearly of the opinion for the reasons above set forth that such power now remains in the trustee. Obviously in this proceeding we cannot now determine either the justice of the claim of D. B. Hall, or its amount, and if the trustee and the claimant are unable to agree upon these matters, the determination of them must be made in the usual way. All that we now decide is that the trustee is still authorized to sell sufficient of the trust estate to defray the expense incurred for her comfortable support to precisely the same extent that he would have been authorized by the trust to provide her "support in comfort during her life." The justice and amount of

the claim of D. B. Hall being first established, both the questions submitted are answered in the affirmative and the papers in the case with the decision of this court certified thereon are ordered sent back to the Superior Court.

Edwards & Angell, for complainant.

John P. Beagan, Arthur A. Thomas, Quinn & Kernan, for respondents.

ALFONSO CAMBIO, v. RAFFAELE IBELLO.

MAY 15, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Pleading. Substituting Declaration.*

In an action of debt on judgment containing a single count after defendant's special plea had been stricken from the record, plaintiff was permitted to substitute another single count:—

Held, that the action of plaintiff in withdrawing his original declaration released defendant from pleading thereto and hence it was immaterial to defendant whether the action of the court was correct or not.

(2) *Directing Verdict. Pleading.*

The court could not properly direct a verdict for plaintiff where there was no plea filed, as there was no issue for the jury to determine.

(3) *Pleading. Nul tiel record.*

A plea of *nul tiel record* is to be heard by the court.

Quære; if the Superior Court has jurisdiction to permit a plaintiff to substitute an action on a different judgment amounting to less than \$500 in place of the original action brought to that court by claim of jury trial.

DEBT ON JUDGMENT. Heard on exceptions of defendant, and sustained.

BLODGETT, J. On November 30, 1909, the plaintiff brought this action of debt in the District Court of the Sixth Judicial District upon a judgment of said court in favor of the plaintiff against said defendant which was set forth in the single count in the declaration as having been rendered on July 31, 1908, and on which it was averred that there was an unsatisfied

balance remaining due of \$169.46 and interest. After decision for the plaintiff in said court the defendant seasonably claimed a jury trial in the Superior Court, and on June 11, 1910, by permission of said court was allowed to file a special plea which said plea was subsequently on June 25, 1910, stricken from the record on motion of the plaintiff. To such striking out of said plea the defendant seasonably excepted. Later, on November 12, 1910, the plaintiff, by leave of said court, substituted for the single count of his original declaration a single count declaring on a judgment of said District Court in favor of the plaintiff as against the defendant alleged to have been rendered on November 7, 1907, on which it was averred that there was still remaining unsatisfied a balance of \$109.29 and interest. On November 26, 1910, the defendant moved for leave to file a special plea to such substituted count, and the Superior Court denied the motion, to which denial the defendant seasonably excepted. On January 13, 1911, and with no plea filed, the case was called for trial on said substituted count, before a jury who returned a verdict for the plaintiff for \$130.06 by

(1) direction of the court. The case is here upon defendant's exceptions, first, to the action of the Superior Court on June 25, 1910, in striking out his special plea to the action as originally brought and also upon his exception to the action of the trial justice in directing a verdict on January 13, 1911. While an exception to the action of the Superior Court in refusing his motion for leave to file a special plea to the substituted count on November 26, 1910, was taken, it was not incorporated in the bill of exceptions and consequently is not before us for consideration.

We are of the opinion that the action of the plaintiff in withdrawing his original declaration released the defendant from all liability to plead thereto or to contest the allegations therein set forth and hence that it is immaterial to the defendant whether the action of the court in striking his plea from the record was correct or was incorrect, and the defendant accordingly takes nothing by this exception.

- (2) The defendant has also excepted to the action of the court

(3) in directing a verdict for the plaintiff, as contrary to the law, and this exception must be sustained. In the first place there was no plea of any kind to the substituted declaration on file when the action was tried, and consequently no issue for the jury to determine. It seems to have been considered, however, that the case was to be tried on the plea of *nul tiel record*. But such a plea is to be heard by the court and not by the jury. In *State v. Sutcliffe*, 16 R. I. 410, the court said: "The defendant pleaded *nul tiel record* and asked for a jury trial, which was refused. The refusal was right. The issue raised by such a plea in a case like this can only be tried by an inspection of the record. The parties cannot put themselves on the country. Stephen on Pleading, *101."

Inasmuch as the case must be remitted to the Superior Court it is proper to state that the question whether the Superior Court has jurisdiction to permit a plaintiff to substitute an action on a different judgment and amounting to less than \$500 in place of the original action brought to that court by claim of jury trial from the District Court is a question which has not been argued by counsel, and upon which we at present express no opinion.

The defendant's exception to the direction of a verdict is sustained, and the case is remitted to the Superior Court for further proceedings.

William M. P. Bowen, for plaintiff.

James A. Williams, for defendant.

SUSAN E. CHAPIN vs. MARDIROS M. STONE.

MAY 19, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Newly Discovered Evidence. New Trial.*

Upon a petition under Gen. Laws, 1909, cap. 297, § 3, for leave to file a motion for new trial in the Superior Court on the ground of newly discovered evidence, affidavits considered and none going to the merits of the controversy;

some being of an impeaching character, and others inadmissible in evidence, the petition will be dismissed.

PETITION under Gen. Laws, 1909, cap. 297, § 3. Dismissed.

DUBOIS, C. J. This is the defendant's petition for leave to file a motion for a new trial in the Superior Court, and reads as follows: "The defendant in the above entitled cause, Mardiros M. Stone, of the City and County of Providence, in the State of Rhode Island, being aggrieved by the decision of the Superior Court sitting in and for the counties of Providence and Bristol, wherein a verdict rendered in favor of said plaintiff, Susan E. Chapin, of said Providence, for the sum of \$500, was sustained by said Court, and this Court having overruled the defendant's bill of exceptions and judgment having been entered thereon, now comes, and within one year after said verdict files this his petition for leave to file a motion for a new trial in said Superior Court on the ground that he has discovered new and material evidence which he had not and could not have discovered before the trial of said cause, said new evidence being set forth in affidavits to be filed herewith and in affidavits filed in this Court in said defendant's Petition for a New Trial of said case now pending in this Court, being Exceptions No. 4366, which affidavits said defendant prays may be referred to and treated as also filed in support of this petition."

It is brought under the provisions of Gen. Laws, 1909, cap. 297, § 3: "When any person is aggrieved by any order, decree, decision, or judgment of the superior court or of any probate court or town council, and from accident, mistake, unforeseen cause, or lack of evidence newly discovered, has failed to claim or prosecute his appeal, or to file or prosecute a bill of exceptions, or motion, or petition for a new trial, the supreme court, if it appears that justice requires a revision of the case, may, upon petition filed within one year after the entry of such order, decree, decision, or judgment, allow an appeal to be taken and prosecuted, or a bill of exceptions or a motion for a new trial to be filed and prosecuted, upon such terms and conditions as the court may prescribe."

- (1) An examination of the affidavits of newly discovered evidence does not convince us that justice requires a revision of the case. There is not one which goes to the merits of the controversy. A large number are of an impeaching character, seeking to affect the credibility of witnesses or the character of the plaintiff. Much of the contents of the affidavits would not be admissible in evidence upon a new trial of the case if one should be had. For example, evidence that the plaintiff had been seen riding in a buggy with a certain man, at a time prior to the occurrence complained of, would have no bearing upon the question of whether the defendant assaulted the plaintiff. The attitude of the neighbors towards the parties since the trial is of no consequence. Moreover, the affidavits in favor of the plaintiff are sufficient to offset the effect of some of those for the defendant.

The defendant's petition is, therefore, denied and dismissed.

Vincent, Boss & Barnefield, for plaintiff.

Edwin C. Pierce, William J. Brown, for defendant.

SUSAN E. CHAPIN vs. MARDIROS M. STONE.

MAY 19, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

- (1) *Petition for New Trial within One Year After Verdict. Newly Discovered Evidence.*

Under the provisions of Gen. Laws, 1909, cap. 297, § 2, newly discovered evidence cannot be alleged as a ground for a new trial.

- (2) *Petition for New Trial Within One Year After Verdict. Allegation of Grounds.*

An omnibus petition under the provisions of Gen. Laws, 1909, cap. 297, § 2, upon the ground that petitioner "did not have a full, fair, and impartial trial in said cause," is deficient.

PETITION FOR NEW TRIAL under Gen. Laws, 1909, cap. 297,
§ 2. Dismissed.

DUBOIS, C. J. The defendant has filed his petition for a new trial in the words following:

"Now comes the above named defendant, Mardiros M. Stone, of the City and County of Providence, in the State of Rhode Island, and shows that in the above entitled cause, wherein in the Superior Court sitting within and for the Counties of Providence and Bristol a verdict was rendered for the above named plaintiff, Susan E. Chapin, also of said Providence, in the sum of five hundred dollars, and this Court having overruled the defendant's bill of exceptions and judgment having been entered thereon, and within one year after said verdict files this his petition for a new trial in said cause upon the following grounds:

"1st. That he did not have a full, fair, and impartial trial in said cause.

"2nd. That he has discovered new and material evidence, which evidence was not and could not be known to him at the time of the trial of said cause, as fully set forth in affidavits now filed and to be filed herewith."

- (1) This petition is evidently brought under the provisions of General Laws, 1909, cap. 297, § 2, which reads as follows: "A party or garnishee in any action or proceeding in the superior court in which a trial has been had which was not full, fair, and impartial, may at any time within one year after verdict or decision petition the supreme court for a new trial; and the supreme court, may, with or without terms, order a new trial in the superior court," which forms a basis for the first ground of his petition.

The second ground, viz.: newly discovered evidence, is inappropriate, and under section two cannot be considered.

The petition does not disclose wherein the trial that he had was otherwise than full, fair, and impartial. In the case of *Campbell v. Campbell*, 29 R. I. 428, which was a petition brought under C. P. A., § 472, which was the predecessor of the present statute under consideration, the petitioner gave the reason why he claimed he did not have a full, fair, and impartial trial in the Superior Court, but as the conduct of the court of which he

complained was subject to exception the relief he sought was denied him.

- (2) The filing of an omnibus petition of this kind is not to be encouraged. It resembles the charge, sometimes included in divorce petitions, of gross misbehavior and wickedness, concerning which in the case of *Brown v. Brown*, 2 R. I. 381, the syllabus reads as follows: "A petition for divorce is sufficiently specific, if it states the grounds of divorce in the language of the statute, except where the petitioner relies upon a charge of gross misbehavior and wickedness repugnant to and in violation of the marriage contract, in which case, the acts relied upon to make out the charge must be specified."

The petition being deficient in this respect must be denied and dismissed.

Vincent, Boss & Barnefield, for plaintiff.

Edwin C. Pierce, William J. Brown, for defendant.

FREDERICK S. NOCK vs. DEMAREST LLOYD.

MAY 24, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

- (1) *Evidence. Sales. Work and Labor.*

While a party may show by expert testimony the defects existing in the work sued for, and the cost of remedying those defects, he cannot show general repairs made by him upon the article some time after it had been delivered to him by plaintiff and the price of such repairs.

- (2) *Evidence. Sales.*

A bill rendered to one party to a suit by a third party does not prove itself or prove that the work therein referred to was done or necessary to be done or that the amount of material charged for was used upon that job or that the prices charged for the same were proper and reasonable.

- (3) *Evidence.*

In an action for work and labor, defendant who has set up in recoupment certain expenses incurred by reason of alleged defective work by plaintiff, cannot inquire of a witness who has not been shown to be an expert in plumbing or cost of repairs thereto, what it cost to have the work repaired.

(4) *Work and Labor. Acceptance of Work.*

Where defendant took his boat away without waiting to signify approval or disapproval of the work done and materials furnished upon it by plaintiff, and it also appeared that the agent of defendant was about the boat during the time it was being repaired and had an opportunity to report upon the work before defendant sailed, the court properly charged the jury that they should consider whether or not defendant by his conduct did apparently accept the work.

ASSUMPSIT. Heard on exceptions of defendant, and overruled.

DUBOIS, C. J. This is an action of assumpsit brought in the Superior Court in the county of Kent to recover for labor and materials furnished by the plaintiff in overhauling and repairing the defendant's boat. In the course of the trial the defendant took certain exceptions, and after verdict for the plaintiff the defendant made a motion for a new trial which was denied by the justice presiding in the Superior Court, to which denial the defendant also took exception. The case is now before this court upon defendant's bill of exceptions, but by agreement of counsel the only exceptions to be considered are those numbered nine, ten, eleven, twelve, thirteen, and fourteen.

The ninth exception was taken to a ruling of the justice presiding at the trial refusing to permit a certain bill for repairs to be introduced in evidence. The ruling to which exception was taken was made while the defendant was testifying in his own behalf. The defendant had just answered the following question: "How many coats of paint did you have put on at Marblehead? A. Two coats." This was followed by this question: "I'll ask you what the amount of the bill was for putting on those two coats?" To this question objection was made: "MR. HUDDY: That, I submit, is entirely improper. MR. PHILLIPS: Well, we will have the bill. MR. HUDDY: I object to the bill. MR. PHILLIPS: This is a copy of the bill. I'll ask you whether you have the original bill, Mr. Lloyd? Witness: I have. No, not the original bill, I have a receipted bill that covers that. I haven't got the original bill. 131 Q. How did you get this receipted bill? A. By paying

the bill. 132. Q. Well, how did you get this particular one? A. Oh, that bill—we had that made out from Stern & McKay—itemized. 133 Q. Is that a copy of the original bill? A. That is a copy, yes. MR. HUDDY: I object to any questions in reference to this bill for repainting. It has no bearing whatever, and is not a proper way of proving this.” After some discussion the court said: “There is not the slightest expert testimony to show that the defects which you complain of made it necessary to go to this expense. Whether it was all necessary as a matter of fact or whether it became necessary in order to keep the boat in the particular way he desired it.” To which counsel for defendant replied: “We have brought in testimony to show how the boat was used since it was painted.” The court then stated: “You may show by expert testimony the conditions of the boat, and the defects which existed in the work and what it would cost to remedy those defects. If you have experts here, that is the most specific way to get at it.”

(1) General repairs of that kind on a boat some time afterwards and the price of them could not be admissible and has no bearing on the question of remedying the defects. MR. PHILLIPS: Well, I have shown the facts by this man’s own testimony that there was no reason why this paint should have begun to peel the way it did or look streaky and whether the waterline—THE COURT: The only expert testimony here is that it is something which happens some times. MR. PHILLIPS: The testimony was in very few cases—THE COURT: You brought that out in cross examination. I will sustain the objection to the question. (Defendant’s exception noted.)”

- The ruling of the court was clearly correct not only for the
- (2) reasons given but because a bill rendered to one party to a suit by a third party does not prove itself or prove that the work therein referred to was done or necessary to be done or that the amount of material charged for was used upon that job or that the prices charged for the same were proper and reasonable. The exception is therefore overruled.

The tenth exception is based upon a ruling refusing to permit

(3) the following question to be asked of Arthur Cheeney, a witness

for the defendant: "152 Q. Now, I would like to ask the question again, what it cost to have it repaired?" The witness was the sailing master for the defendant, and there was no evidence that he was an expert in the matter of plumbing or cost of repairs thereto which was the subject matter of the inquiry and the exception is therefore untenable.

The eleventh exception is based upon the following portion of the charge of the justice presiding at the trial: "You will remember that according to the testimony the boat was the next morning after the defendant arrived in town taken away. That matter has been called to your attention. I will charge you as to the law governing the acceptance of the work. If you are sold an article and that article is not as represented it would be, it would be your duty to return that article in a reasonable time, rather than to keep it a long time and, finally, when suit was brought against you, complain that the article sold you was not such an article as you agreed to buy, such an article as was represented to you. That may apply to certain items of the bill, certain articles which were delivered which could be returned. Of course, the labor which was expended on this boat could not be returned as such, and the varnish and paint could not be taken and handed over bodily to the plaintiff. It is a physical impossibility. But, if you have work of this nature done and you accept the work, in other words, by your conduct you tacitly agree that the work is all right, you cannot, at some later date, when a man would like to have his pay for the labor, complain that the work which you once accepted was not all right, or not proper work and labor furnished to you.

- "That is one question for you to take into consideration, whether or not the defendant, by his conduct, did apparently accept the work—not whether he took the boat and went away with it,—it is admitted that he did have the boat and went away with it,—but whether or not the work was acceptable to him at that time." To which exception was taken by counsel
- (4) for defendant, as follows: "MR. TILLINGHAST: I would like an exception to so much of Your Honor's charge as dealt with

an inference that may be drawn against the defendant by reason of any tacit acceptance of the work. Defendant's exception noted." This portion of the charge when carefully considered does not appear to be objectionable. The defendant took the boat away early in the morning after his arrival without waiting to signify his approval or disapproval of the work done and materials furnished by the plaintiff upon this boat. It also appears that the sailing master of the defendant was upon or about the boat during the time that the same was being repaired by the plaintiff, and had an opportunity to make a report, favorable or unfavorable, as the case might be, to his employer before they sailed away in the morning. It was a circumstance for the jury to consider, and we do not find that the court unduly emphasized it. The exception is without merit and is, therefore, overruled.

The twelfth, thirteenth and fourteenth exceptions relate to the refusal of the court to grant the defendant's motion for a new trial upon the grounds that the verdict is against the law and the evidence and that the damages awarded are excessive. These exceptions must be overruled. The evidence was conflicting and therefore clearly within the province of the jury. It was for them to say who, what and how much was worthy of belief. The verdict is not against the law, and we cannot say that the damages are so large as to warrant the assumption that the jury were swayed by passion, prejudice or some other improper motive in assessing the same. Moreover, the verdict has been approved by the justice who presided at the trial. In these circumstances the rule referred to in the case of *Wilcox v. The Rhode Island Company*, 29 R. I. 292, should be allowed to operate.

The defendant's exceptions are therefore overruled, and the case is remitted to the Superior Court within and for the county of Kent, with direction to enter judgment on the verdict.

Mumford, Huddy & Emerson, George H. Huddy, Jr., for plaintiff.

Green, Hinckley & Allen, for defendant.

Frederick W. Tillinghast, of counsel.

R. I. HOSPITAL TRUST COMPANY vs. SARAH L. HUMPHREY *et al.*

MAY 25, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Adoption.*

The status of an adopted child depends upon the statute of adoption.

(2) *Adoption. Inheritance.*

Pub. Stat. (1882) cap. 164, § 7, of adoption, provided that a child so adopted shall be deemed for the purposes of inheritance the child of the parents by adoption, except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation.

Testator bequeathed the income of a trust fund to his sister A. for life, with provision for distribution of the principal upon the death of A. to his then surviving next of kin, according to the statutes of distribution. Subsequent to decease of testator A. adopted B.:—

Held, that the property being from the collateral kindred (brother) of the mother by adoption, B. came within the disabilities of the statute, preventing her from inheriting any portion of the fund.

BILL IN EQUITY. Heard on certification under Gen. Laws, cap. 289, § 35.

DUBOIS, C. J. This is a bill in equity, involving the construction of the will of Alexander Hawkins, late of Providence, deceased, certified to this court from the Superior Court as being ready for hearing for final decree, under the provisions of Gen. Laws, 1909, cap. 289, § 35.

It appears that said Alexander Hawkins died on the eleventh day of December, 1894, leaving a last will, which, on the eighth day of January, 1895, was duly admitted to final probate, and now remains of record, in the Municipal Court of said city of Providence.

That in and by his said will the said Alexander Hawkins made the following bequest: "To said Rhode Island Hospital Trust Company twenty-five six per cent. bonds of the State of North Carolina payable in 1919 together of the par value of twenty-

five thousand dollars, in trust, to pay the net income thereof, as often at least as once in every six months, to my sister Ann, wife of George W. Humphreys, of said Providence for her own sole and separate use, and without the power on her part to alienate or anticipate the same during her life; and upon her death to pay out, divide and distribute the principal of this trust fund to and among my own then surviving next of kin according to the statutes of distribution of intestate estates then in force in this state, and in the proportions and shares that they would then be entitled to the same from me according to the same statutes had I then deceased intestate possessed of the same."

That said Ann Humphreys—generally known as Annie S. Humphrey—died at Warwick, in this State, on the twentieth day of June, 1909, testate, without leaving any issue of her body; but leaving surviving her the respondent, Sarah L. Humphrey, who, by virtue of a decree, of the Municipal Court of the city of Providence, exercising probate jurisdiction, entered on the twelfth day of April, 1895, was adopted by the said Annie S. Humphrey and her husband, since deceased, as their daughter. Said Sarah L. Humphrey claims "that as such adopted daughter she is one of the next of kin of the said Alexander Hawkins, and as such is entitled to a distributive share in the trust fund in said bill referred to, to wit, to a one-sixth ($\frac{1}{6}$) share thereof."

It is to be noted that the respondent Sarah L. Humphrey makes no claim of kinship by consanguinity to the testator, Alexander Hawkins, but bases her contention solely upon her status as the daughter by adoption of the said Annie S. Humphrey and her husband. This presents the following question for our determination: Did Annie S. Humphrey, the sister of the testator, artificially increase the number of *his next of kin*, after his decease and the probate of his will, by the adoption of a child?

The statute, under whose provisions the adoption was
(2) effected, is Pub. Stats. (1882) cap. 164 (substantially re-enacted in Gen. Laws, 1909, cap. 244) which, after prescribing the

procedure to be followed, by petitioners thereunder, to obtain a decree of adoption, and the conditions under which the decree may be made, defines the effect of such decree upon the property rights of the adopted child, as follows: "Sec. 7. A child so adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." The foregoing statute was first introduced into this State as Pub. Laws, cap. 627, passed March 26, 1866, and its provisions are almost identical with those contained in Mass. Gen. Stats. (1860) cap. 110, sections 1 to 10, inclusive, and section 13. The last named statute was construed by the Supreme Court of Massachusetts in the case of *Sewall v. Roberts*, 115 Mass. 262, 276: "This language is very broad and comprehensive, and it was manifestly the intention of the legislature to provide that, with the exceptions named, the adopted child should, in the words of the sixth section, 'to all intents and purposes be the child of the petitioner.' The adopted child, in this case, therefore, in construing her father's settlement, must be regarded in the light of a child born in lawful wedlock, unless the property disposed of by the settlement falls within one of the exceptions. It is true that if she takes under the settlement, the property does not come to her by inheritance, but it comes to her as one of the legal consequences and incidents of the natural relation of parents and children. Does it fall within either exception of the statute? It cannot be claimed that it falls within the last exception as property from the kindred of the parents by right of representation." The court found that it was not property limited to the heirs of the body or bodies of the parents by adoption, and that the words "heir of the body" is a well established technical term, and that under the statutes of Massachusetts, technical words and phrases which

have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning, unless it is inconsistent with the manifest intent of the legislature or repugnant to the context, citing Gen. Stats. cap. 3, § 7. The court also found that the legislature intended to use the phrase "heirs of the body or bodies" in its primary technical sense and that the terms of the settlement in dispute do not limit the estate expressly to the heirs of the body of the settlor. In the case of *Hartwell v. Tefft*, 19 R. I. 644, this court said in reference to the predecessor of the statute now under consideration: "In Maine, under a statute similar to ours, it was held in *Warren v. Prescott*, 84 Me. 483, that the exception relates only to an *inheritance* as an heir of the body. The reasoning is that where an estate is limited to one and the heirs of his body, it must go to those to whom it is expressly limited, and that an adopted child, although he is to be regarded as a child, an heir, and a lineal descendant of his adopting parents, does not answer the description of an heir of the body, and so he cannot take the property out of the line to which it was limited. An adopted child is put, by the statute, into the *status* of a child, issue or lineal descendant, but not that of an heir of the body. Hence, as to a legacy, when a legatee dies before the testator, leaving an adopted child, such child answers the description of a lineal descendant, who may take the legacy under a statute which prevents legacies from lapsing when the legatee leaves lineal descendants. The reasoning seems to be conclusive. It is the same result that was reached in *Sewall v. Roberts*, 115 Mass. 262, although the reasoning in the latter case is not so fully and clearly set forth as in the former. The court holds that the words "heirs of the body" are used in their primary technical sense, with which the words children and issue are not equivalent terms. See also *McGunnigle v. McKee*, 77 Pa. St. 81."

In the case at bar the property disposed of by the will clearly falls within one of the exceptions. It is property from the collateral kindred (brother) of the mother by adoption of the respondent, Sarah L. Humphrey. If she takes the property at

all it comes to her by inheritance, and she takes it by right of representation. She cannot prove the kinship that she claims to the testator except as the daughter of her adoptive mother. The case is very different than it would have been if the property had come to the possession of her mother by adoption during life, there would have been no question of her right to inherit in such a case; but her said mother only had the income of the trust fund for life, the title to the same remaining in the trustee, and so it never could come into her possession. Even if the respondent aforesaid had been in fact the child of the body of her adoptive mother and was now claiming an interest in the corpus of the trust fund she would still be claiming property from the collateral kindred of such parent by right of representation, which under such supposed circumstances she would have a perfect right to do. As it is she may be said to be next of kin to her adopted parents for certain purposes, but the law does not at present extend the kinship to other kin of such parents who can not be made parties to the adoption

(1) and are not to be bound thereby. In other words, the status of an adopted child depends upon the statute of adoption. If the legislature had seen fit to pass the statute without exceptions there would be no difference between children born to or adopted by their parents, but it is to be presumed that the legislature intentionally inserted the exceptions alluded to, and they are entitled to be considered as in full force, and they mark the difference between children born in wedlock and adopted children. The respondent in question comes within the disabilities of the latter class which will prevent her from inheriting any portion of the fund in question.

In the circumstances of the case we are of the opinion that neither party should recover costs.

A form of decree may be submitted in accordance with the foregoing for approval.

James Tillinghast, for complainant.

Barney & Lee, for respondent, Sarah L. Humphrey.

McDUFF COAL & LUMBER CO. vs. VINCENZO DEL MONACO et ux.

MAY 25, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Mechanic's Lien. Segregation of Materials. Separate Tracts.*

In a single notice of claim of lien, petitioner's claim was stated as being for certain materials to be used in the construction of a certain building upon "those certain lots of land with buildings, laid out and designated as lots numbered 11, 12, and 15," on a certain plat.

In the single statement of their account, filed as the commencement of legal process, the claim was stated "to the extent of one-third of account set forth in detail and annexed hereto in that certain building and the land on which it is located, described as: (a) the southerly half of that lot designated as number 11 on the X. plat; and one-third of account in that certain building and the land on which it is located described as (b) the northerly half of the same lot, and one-third of account in that certain building and the land on which it is located, described as (c) lot 15 on the same plat:—

Held, that the case was governed by *McElroy v. Keily*, 27 R. I. 64, and petition must be dismissed.

MECHANIC'S LIEN. Heard on appeal from decree of Superior Court establishing lien and appeal sustained, and decree reversed.

BLODGETT, J. This is an appeal from a decree of the Superior Court establishing a mechanic's lien for materials used in the construction, erection, and reparation of three houses in the city of Providence, situated upon land of the respondents in the city of Providence, and described respectively as (A) the southerly half of lot 11 on the "Stephen Randall Plat, Johnston, R. I., made June 1885 by C. M. Hunt" and recorded in the office of the recorder of deeds in said city of Providence on plat card No. 765. (B) The northerly half of the same lot, and (C) the whole of lot 15 on the same plat. The lien in question is claimed for materials furnished to the contractors Giuseppe D'Abbraccio and Francisco Benedetto, within the sixty days prior to August 7, 1909, the total amount of such materials so furnished exceeding \$1,600, as testified by one of the plaintiffs, and upon which \$932.34 had been paid

prior to the institution of this proceeding—\$532.34 of which amount was so paid within said period of sixty days and on June 14, 1909.

In the single notice of claim of lien served upon the respondents and filed in the office of the recorder of deeds in Providence, the petitioners claim is thus stated as being for "certain materials namely lumber, lime, cement, nails and other building materials of the value of, to wit, six hundred and twenty-five (\$625.00) dollars, to be used in the construction, erection and reparation of a certain building upon certain land hereinafter described," and the land is thus described: "Those certain lots of land, with buildings and other improvements thereon, situate in the said city of Providence, and are laid out and designated as lots numbered 11 (eleven), 12 (twelve), and 15 (fifteen) on the Stephen Randall Plat, Johnston, R. I., made June 1885 by C. M. Hunt, recorded in the office of the recorder of deeds in said city of Providence, on plat card 765." In the single statement of their account filed in the office of said recorder of deeds as the commencement of legal process their claim is thus stated: "To the extent of one-third of account set forth in detail and annexed hereto and made a part hereof, in that certain building and the land on which it is located, said land being bounded and described as follows:

"A. The southerly half of that certain lot of land situated in the city of Providence in the State of Rhode Island laid out and delineated as lot number 11 on the 'Stephen Randall Plat Johnston, R. I. made June 1885 by C. M. Hunt,' and recorded in the office of the recorder of deeds in said city of Providence on Plat Card 765." And said claim is repeated therein "to the extent of one-third of account set forth in detail and annexed hereto and made a part hereof" as to each of the other lots first above specified.

- (1) An examination of the transcript of the testimony shows that the petitioners have proceeded upon the theory that inasmuch as these three houses on separate tracts of land were undergoing construction, erection and repair at or about the same time, the petitioners had a general lien on all of them for

a general balance due, on the theory that probably approximately one-third of the materials had been used in each house and that consequently they could include all three claims for lien in one proceeding. A similar contention was unsuccessfully made in *McElroy v. Keily*, 27 R. I. 64, and 474, which was also based upon a contract with a contractor and not with the owner of the land, in which this court held (pp. 66, 67): "It is evident from the tenor of the whole act that the primary thing to which the lien attaches is the building into which the work and materials enter, and that the extension of the lien to include the land is secondary. In this view each building must be considered and treated as a unit, and each building must be so segregated that it can be considered by itself." . . .

"If so, we can not hold that work done or materials furnished, as in the present case, upon two estates of the same owner, without any contract at all with him—indeed, without his knowledge—can be charged indiscriminately upon both estates. Whatever force we might give to the contention that where an owner had made a contract with one person for the erection of two or more adjacent buildings he might be considered to have agreed that these buildings, for the purposes of the contract and its enforcement, should be considered as a unit, we have no privity of the parties interested in the present case upon which to found a waiver of the strict terms of the statute," and p. 474: "Upon the plain language of the statute we are confirmed in our former opinion that in a case like the present a separate account of the materials furnished for each building is required."

In the present case it appears that more than \$900 has been paid on a total indebtedness of about \$1,600. It is evident that these payments upon the theory of an exact appropriation of the same amount of materials to each house are sufficient to discharge the lien on any one of them and are almost enough to discharge the lien on any two of them. But the plaintiff has failed to prove even this exact appropriation, but rather assumes such to be the case. He could by proper bookkeeping have shown exactly the materials which entered into each house, and if he neglects to do so, it is less of a hard-

ship to require him to do this than it is to require the innocent owner of the land to pay him, it may be a second time, for an indebtedness to the contractor which he may already once have paid.

The case is governed by the decision of this court in *McElroy v. Keily*, *supra*, and the decree of the Superior Court must be reversed.

Case remanded to the Superior Court, with direction to deny and dismiss the petition.

James J. McGovern, for petitioner.

Anthony V. Pettine, Gorman, Egan & Gorman, for respondents.

HENRY E. SMITH vs. EDWARD B. HUNT.

MAY 29, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Landlord and Tenant. Surrender and Acceptance.*

Defendant a monthly tenant upon giving notice of intention to move was informed by plaintiff that the notice was insufficient, and that rent for the succeeding month would be claimed. Plaintiff also wrote defendant to same effect, and suggested necessary precautions to prevent damage to the premises. Plaintiff also at an interview with defendant insisted that he should claim an additional month's rent. After defendant moved, plaintiff ascertained that the water had frozen and defendant left a key with plaintiff for the purpose of having the plumbing repaired. No other keys were delivered, and plaintiff, after repairing the plumbing, had certain ordinary repairs made such as are commonly made while a tenant remains in possession. Some of this work was done prior to the termination of the period for which plaintiff claimed rent, but without objection from defendant, who came to the house while the work was being performed:—

Held, that there was no surrender and acceptance of the premises, and that plaintiff was entitled to recover for the month in question.

(2) *Landlord and Tenant. Termination of Lease. Surrender and Acceptance.*

The relation of landlord and tenant cannot be determined except by the expiration of the lease where there is a lease for a fixed term or, in case of a tenancy from year to year or from month to month by notice given in accordance with the statutory requirements, except by the surrender of the premises by the tenant and the acceptance of such surrender by the

landlord. Whether or not there has been such acceptance or surrender is to be determined by the intention of the parties, and this intention is to be determined by their acts and words.

(3) *Right of Landlord to Enter Abandoned Premises.*

In case of abandonment of leased premises by a tenant it is the landlord's right to enter and do such work as is necessary for the protection of the property and entrance for such purpose and the performance of such work will not convert a mere abandonment by the tenant into a surrender and an acceptance thereof.

ASSUMPSIT. Heard on exception of defendant, and overruled.

PARKHURST, J. This action was brought in the District Court for the Sixth Judicial District to recover rent and money expended to repair damages occasioned by the failure of the defendant to properly shut off water from a house. The cause was, after decision for defendant, removed to the Superior Court on plaintiff's demand for a jury trial. In the Superior Court, jury trial was waived, and the cause was tried before Mr. Presiding Justice Tanner.

At the trial it appeared that the defendant was occupying a house in Cranston as tenant from month to month under the plaintiff; that the monthly tenancy was from the fifteenth day of one month to the fifteenth day of the following month; and that the monthly rate was thirty dollars.

January 10, 1909, the defendant's wife orally informed the plaintiff that her family intended moving during the week then next ensuing. The plaintiff informed her that the notice was insufficient, and that he would be entitled to the rent for the month ending February 15th. The next day the plaintiff wrote to the defendant to the same effect, and also made certain suggestions as to necessary precautions which should be taken to prevent damage to the plumbing in case the defendant moved out during the cold weather. This letter was followed by an interview at plaintiff's house, between the plaintiff and the defendant. At this interview the plaintiff insisted that the defendant, for want of proper notice to terminate the tenancy, was liable for an additional month's rent, and, to assist the

defendant, offered to accept payment in three equal installments, one in February, one in March, and one in April. The defendant said to the plaintiff that such an arrangement would help him, and, according to the plaintiff's testimony, promised to pay in accordance with plaintiff's offer. The defendant removed from the house January 12, 1909.

January 17, the plaintiff, in examining the premises, found a window open. He entered through the window and ascertained that water had frozen in the closets, tanks, and traps. He then induced the defendant to visit the premises with him. The parties effected an entrance by means of the defendant's key to the back door. It was then agreed that the plaintiff should procure a plumber to do the work necessary to prevent damage, and the key to the back door was left with the plaintiff for that purpose. No other keys were ever delivered by the defendant to the plaintiff. The plaintiff had the plumbing put in order and also had certain renovating work performed in the house, generally, to place the same in suitable condition for another tenant, a part before February 15th. The work was finished and the house re-let in April, and the back door key was not returned to the defendant. The plaintiff paid for the plumbing \$4.80, and sent the receipted bill to the defendant. While the renovation was in progress, the defendant was at the house and removed certain of his property which he had left when he moved January 12th. The defendant raised no objection to the prosecution of the renovating work, nor did he at the trial claim to have been damaged thereby.

- (1) At the conclusion of the testimony, the Presiding Justice rendered a decision that the plaintiff was entitled to recover the amount of the rent for the month in question, \$30, and for plumbing work to the amount of \$2, making a total amount of \$32. To this decision the defendant has excepted.

The principal question involved is whether or not the delivery of the back door key to the plaintiff and his entry to make repairs to the plumbing, made necessary by the defendant's abandonment of the house in winter weather, and his subsequent general repair of the house to put the same in proper

condition for rental to a new tenant, some of which repairs were made prior to February 15th, under the circumstances was a surrender by the defendant of the premises let and an acceptance by the plaintiff.

The secondary question suggested in his brief by the plaintiff as to the amount to which the plaintiff is entitled on account of his expenditures to prevent damage by reason of the ice in the plumbing fixtures, is not open to us upon the record, because the plaintiff has taken no exception to the decision.

The defendant insists that his surrender of the back door key to the plaintiff, and plaintiff's entry on the premises for the purpose of repairing the plumbing damaged and rendered unsafe by reason of the freezing due to the negligence of the defendant in abandoning the premises in winter, without proper precautions, and the subsequent general repair of the house by the plaintiff, who did some of the same during the month for which rent is claimed, constitute such a surrender on the part of the defendant, and acceptance on the part of the plaintiff, as to terminate the letting, and relieve the defendant of liability to pay any further rent. Defendant's counsel in his brief and argument quite ignores the fact that the plaintiff, upon being notified on January 10th by defendant's wife of their intention to leave during the next week, informed her that the notice was insufficient and that he would be entitled to the rent for the month ending February 15th; that the next day plaintiff wrote to defendant to the same effect, and warned him as to precautions to be taken with regard to the plumbing in case he moved as intended; and further ignores the fact that the plaintiff again notified the defendant at a personal interview that he would hold him for a month's rent up to February 15th, if he moved as intended, without legal notice. These latter facts clearly distinguish the case at bar from the case of *White v. Berry*, 24 R. I. 74, which is the only Rhode Island case cited by the defendant, and upon which he relies; because in that case the defendant gave nearly three months' notice of his intention to terminate the tenancy, the plaintiff never made any objection, made no claim for additional rent, until long

afterwards, within a month advertised the house for rent and showed it to tenants, accepted the keys and entered and put up signs "To Let" in the house; it was held upon petition for a new trial, that there was ample evidence of a surrender by the tenant and acceptance thereof by the plaintiff to support the verdict of the jury in favor of the defendant.

In *MacKellar v. Sigler*, 47 How. Pr. 20, also cited by defendant, the defendant was held liable for one month's rent payable in advance for a month after he abandoned the tenement; but the court held that, by reason of acts subsequently done by the landlord, by acceptance and holding of keys, by entry, making repairs, and subsequent letting, there was sufficient evidence that the landlord had accepted the surrender, after the termination of the month for which rent was allowed to be recovered.

In *Nelson v. Thompson*, 23 Minn. 508, also cited by the defendant, it was held (speaking of the landlord's agent), p. 512, that "He received the key only conditionally, and with the express declaration that he should still continue to hold the lessees for the rent, upon the covenant in their lease. There can be no pretence, then, of any surrender by virtue of any agreement, as this necessarily implies an intentional and express assent on the part of the lessor to the termination of the lease. Neither can any surrender by operation of law be predicated upon these facts." So far as this case goes, therefore, it is in favor of the plaintiff in the case at bar, and against the defendant's contention.

- (2) The relation of landlord and tenant cannot be determined except by the expiration of the lease where there is a lease for a fixed term or, in case of a tenancy from year to year or from month to month, by notice given in accordance with the statutory requirements, except by the surrender of the premises by the tenant and the acceptance of such surrender by the landlord. Whether or not there has been such acceptance or surrender is to be determined by the intention of the parties. This intention is to be determined by their acts and words. *Coe v. Cassidy*, 72 N. Y. 133; *Talbot v. Whipple*, 14 Allen, 177. Sending a key to the owner without more is not such a surrender

and acceptance. *Newton v. Speare Laundering Co.*, 19 R. I. 546; *Durfee v. The United Stores*, 24 R. I. 254; *Nelson v. Thompson*, 23 Minn. 508, and cases *infra*.

- (3) In case of abandonment of leased premises by a tenant, it is the landlord's right to enter upon the premises and do such work as is necessary for the protection of the property and entrance for such purpose and the performance of such work will not convert a mere abandonment by the tenant into a surrender and an acceptance thereof. *Smucker v. Grinberg*, 27 Pa. Super. Ct. 531; *Breuckmann v. Twibill*, 89 Pa. 58; *West Side Auction House Co. v. Conn. Mut. Ins. Co.*, 186 Ill. 156; *Gaines v. McAdam*, 79 Ill. App. 201, and *Biggs v. Stueler*, 93 Md. 100. It is also held that the resumption of possession by the landlord and the making of general repairs before the expiration of the term is not conclusive evidence of an acceptance of a surrender, but is entirely consistent with a distinct refusal. In *Breuckmann v. Twibill*, 89 Pa. 58, *supra*, the facts in the case showed that, after abandonment by the tenant and during the time for which rent was claimed, "the plaintiff immediately took possession of said premises and proceeded to repair the house, by building a new bathroom, a new porch, putting in a new range, and making general repairs, such as could not have been done while the house was occupied by a tenant; deponent saw the house repeatedly during the time for which rent is claimed in the suit, and plaintiff was in possession all that time; and said repairs were going on for the greater part of that time." Upon this state of facts the court in its opinion says: "The plaintiff in error in his affidavit of defence very carefully avoided alleging that there was a surrender of the lease accepted by the landlord. Certain facts are averred, which, standing by themselves, would be evidence from which a jury might infer a surrender, but yet entirely consistent with a distinct refusal. Taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay the rent."

In *Biggs v. Stueler*, 93 Md. 100, *supra*, where it was shown that after abandonment by the defendant, the plaintiff took

the keys under protest, refusing to accept surrender, notifying the defendant that he would be forced to rent the property "for your account and risk, charging you with any loss on same," &c., and then took possession and in order to rent the property was compelled to make certain repairs, the court held that such taking possession and making repairs and subsequent rental to other parties are not in themselves sufficient to show an acceptance by the landlord of the surrender of the term so as to release the tenant from all liability for rent.

In the case at bar, it is possible that the taking of the key and the making of repairs prior to the fifteenth of February are facts from which, if they stood by themselves, the court below might have inferred an acceptance of defendant's surrender. But these facts are to be considered in connection with the express refusal contained in the plaintiff's letter of January 10th; the undisputed demand of the plaintiff that the rent for that month should be paid, while willing to agree that it might be paid in three installments, in order to make it easier for the defendant, the undisputed fact that the back door key was left with the plaintiff for the purpose of enabling him to have work performed for the preservation of his property to remedy the neglect of the defendant or some person acting under his authority, and the entire absence of objection on the part of the defendant to the painting and papering performed by the plaintiff. It is also to be noted that there is no evidence that any of the work done prior to February 15th was of such a character as to have been inconsistent with the defendant's continued possession and use of the property, up to February 15th, if he had seen fit to continue his occupation, as he had a right to do, being notified before he moved that he would be held for the rent up to that time. So far as the transcript shows, only such ordinary repairs were made prior to February 15th as are commonly made while the tenant remains in possession. When so considered, it is clear that the deduction of fact drawn by the Presiding Justice of the Superior Court not only was warranted, but was logically unavoidable.

The defendant's exception is overruled, and the case is

remitted to the Superior Court, with direction to enter its judgment for the plaintiff upon its decision.

C. M. Van Slyck, Frederick A. Jones, for plaintiff.

Edward M. Sullivan, Francis E. Sullivan, for defendant.

LOUIS BOLOTOW vs. JOHN BARNES.

MAY 31, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Decision of District Court without Notice to Party. Duty to follow Cause.*

A case was tried in a district court and held for advisement and decision rendered without notice thereof to the parties whereby petitioner alleged that he was deprived of the opportunity to claim a jury trial:—

Held, that as the duty of notifying parties of its decisions is not imposed by statute upon a district court, and as the petition contained no allegation that the court agreed to so notify petitioner, the case followed the general rule that a party who fails to follow his cause is without remedy.

PETITION for trial. Denied and dismissed.

BLODGETT, J. On January 14, 1911, the following petition was filed in the office of the clerk of this court:

“Louis Bolotow of Cumberland in said county, respectfully represents that he was the plaintiff and John Barnes of said Cumberland is defendant in an action at law, as above entitled, in the district court of the eleventh judicial district at Central Falls, in said county, which said action was tried in said court on, to wit: the first day of December, A. D. 1910, and held for advisement by said court. And your petitioner shows that neither he nor his counsel knew of the time when said court was to render decision in said action, but, he shows, decision was rendered for the defendant, the said Barnes on, to wit: the eighth day of December, A. D. 1910, but your petitioner was not, nor was his counsel, notified of said decision, and neither your petitioner knew of said decision until more than

two days after the same was rendered, when it was too late to claim a jury trial therein. Wherefore your petitioner says that by reason of accident, misfortune and mistake, he has been deprived of a fair trial of said action and of a trial by jury.

"And the petitioner further shows that since the trial of said action he has discovered new and important evidence in relation to said action and cause of action which he did not know of and by due diligence could not have known of before said trial.

"Wherefore he prays for a new trial or a trial by jury of said action.

"By his Attorney,

HUGH J. CARROLL."

The statute does not impose upon a district court the duty of notifying parties of its decisions and there is no allegation in the petition that the trial justice in any way agreed or promised the petitioner that such notification should be given to him. The case, therefore, follows the general requirement in such cases, that a party must follow his cause if he desires to have the action of the district court reviewed elsewhere or desires a jury trial, and if he fails to do so he is without remedy.

In *Opie v. Clancy*, 27 R. I. 42, 50, this court thus declared the law: "If a party loses the opportunity of making his defense or of taking other steps necessary for the preservation or enforcement of his rights, by reason of the neglect, inattention, or mistaken advice of his own attorney, without any fraud or unfairness of the adverse party, it is in law, as between him and the adverse party, the same as if he had lost it by his own neglect, inattention or fault."

An examination of the affidavits as to newly discovered evidence does not show any ground for a new trial even if there were no other objection to granting the petition.

Petition denied and dismissed.

Hugh J. Carroll, for plaintiff.

Wilbur A. Scott, for defendant.

PREMIUM TEA COMPANY vs. GEORGE MALLOVELLE.

MAY 27, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Charging Garnishee by Default Not a Judgment.*

Where a garnishee in case of his default becomes liable by force of statute, and not by an adjudication of the court, the fact that he is charged by his default cannot be regarded as a judgment, and the garnishee may offer any defence he may have in an action against him to recover the amount for which he was charged.

PETITION for a trial by a garnishee. Heard and dismissed.

BLODGETT, J. This is a petition of the Wanskuck Company, charged as garnishee in the above entitled case, by reason of an alleged failure to make disclosure, asking for a trial as to the question of its liability as such garnishee and is as follows:

“To the Honorable Supreme Court:—

“1. The Wanskuck Company, a corporation organized under the laws of this state, and doing business in the city of Providence, represents that on the 16th day of July, 1909, an action of the case was begun in the District Court of the Sixth Judicial District by Osher and David Tabrisky of Providence, doing business as Premium Tea Company, against George Mallovelle, alias John Doe, defendant, to recover a sum therein alleged to be due on book account, which writ was returnable to said District Court on the 5th day of August 1909, when it was duly returned.

“2. That on said 16th day of July, 1909, said writ was served on your petitioner for the purpose of attaching the personal estate of the defendant in its hands and possession as the trustee of the defendant.

“3. That on the 26th day of July, 1909, William H. Taylor, who then was, and ever since has been an officer of said Wanskuck Company, to-wit, ‘clerk,’ and as such qualified to render upon oath the account in writing required by Section 10,

Chapter 301 of the General Laws, 1909, prepared and rendered an account in writing upon oath to said District Court, stating that at the time of the service of said writ upon said Wanskuck Company, said Wanskuck Company had none of the estate of the defendant in its hands or possession, either directly or indirectly, as follows, viz.:

STATE OF RHODE ISLAND, &C.
PROVIDENCE, SC.

To the District Court
of the
Sixth Judicial District,
at the
City of Providence.

PREMIUM TEA Co. }
 vs. }
GEORGE MALLOVELLE. } August 5th, A. D. 1909.

ANSWER OF TRUSTEE.

I, William H. Taylor, acting for treasurer of the Wanskuck Co., with whom a copy of a writ was left for the purpose of attaching the personal estate of the defendant in the hands and possession of said Wanskuck Co., as trustee, on oath depose and say, that at the time such writ was served, the Wanskuck Co. had in its hands and possession no estate belonging to the said defendant, the sum of no dollars and no cents, and no more, either directly or indirectly.

(Signed)

WM. H. TAYLOR,

Acting for Treasurer.

PROVIDENCE, SC.

Subscribed and sworn to in Providence in said county, this 26th day of July, A. D. 1909.

Before me,

HENRY K. METCALF,

Notary Public.

"4. That by accident, mistake and unforeseen cause the said William H. Taylor failed to set out in said account that he was an officer of said Wanskuck Company for the reason that he followed a long established usage and custom of said corporation in such matters, covering a period of many years, and designated himself as 'acting for the treasurer of the Wanskuck Company' instead of as 'clerk.'

"5. That for many years prior to the date of the service of this writ, the said William H. Taylor had rendered to said District Court similar accounts in writing upon oath, showing that various persons, defendants, had no estate, or what estate they had (as the case might be) in the hands or possession of said Wanskuck Company at the time of the service of various writs upon it, and that in such accounts he had never set out that he was the clerk of said Wanskuck Company, but had always designated himself as in this instance, and that such accounts had always before been received and accepted as sufficient by said District Court, and by all parties, and that to the best of his information and belief the practice of filing such accounts in the form above set out has been in existence in said Wanskuck Company for the last twenty years, and originally commenced under legal advice.

"6. That subsequently judgment by default was rendered against the defendant, George Mallovelle, alias, in favor of said Premium Tea Company, and on, to-wit, August 27, 1909, your petitioner without notice, and without trial was charged as garnishee with the amount of the judgment against said Mallovelle and costs, because of your petitioner's alleged neglect to file an account as by law required.

"And now within one year after said judgment, and after the judgment, decree and order of the District Court of the Sixth Judicial District charging said Wanskuck Company as trustee of said defendant, the Wanskuck Company comes and prays that a trial of said action may be had, at least in so far as the question of its liability is concerned, and that the judgment, decree and order of said District Court charging your petitioner as garnishee of the defendant, may be set aside, and that your

petitioner may have such other relief in the premises as your Honors may deem proper under the provisions of Section 471 of the Court and Practice Act, and of Section 1, Chapter 297 of the General Laws, 1909, and such other relief as to your Honors may seem proper.

"And that a citation may issue directed to the said Osher and David Tabrisky commanding them and each of them on a day therein named to appear and show cause if any they have why the prayer of this petition should not be granted.

WANSKUCK Co.,

by William H. Taylor, *Clerk.*"

In *Eddy v. Providence Machine Co.*, 15 R. I. 7, 10, 11, it was said by this court that "If, therefore, a garnishee in case of default, becomes liable by force of statute, and not by an adjudication of the court, the fact that he is 'charged by his default' cannot be regarded as a judgment. It follows that the defendant is not bound by the charging in the Justice Court, but may show . . . that he duly filed his affidavit, (1) and should not have been charged." That case is decisive of the case at bar, and inasmuch as no judgment has been entered against the garnishee it may offer any defence it may have in the action now pending against it. And see *Marshall v. McCormick*, 27 R. I. 357.

Petition denied and dismissed.

Harry P. Cross, for petitioner.

Fred T. Owen, for respondent.

HUGH MORAN, *et ux.* vs. JAMES LAVELL.

MAY 29, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Landlord and Tenant. Demand Necessary Before Forfeiture. Tender.*

Under a covenant in a lease, whereby lessee agreed to pay the stated rent on the eleventh day of each month and in case of failure to pay any rent with-

in ten days subsequent to the time, that lessor might terminate the lease, lessee made tender of the rent due on the 11th of a month to the lessor on the 22nd of that month which was refused and lessor brought ejectment.

Held, that demand by the lessor was necessary before he could declare a forfeiture and that the tender on the 22nd, prior to the declaration of forfeiture, was a good tender and precluded lessor from thereafter declaring a forfeiture.

TRESPASS and ejectment. Heard on exceptions of plaintiff and overruled.

PARKHURST, J. This is an action of trespass and ejectment brought by the plaintiffs against the defendant in the Sixth District Court, and later brought to the Superior Court on claim for jury trial, to obtain possession of a certain store at number 370 Valley street in said Providence. The premises on which said store is located were originally owned by William E. Stuart who sold the same to the plaintiff and his wife, by deed dated April 15, 1909, and duly recorded the same day; said deed being subject to a lease to the defendant Lavell, which lease was executed on February 11, 1908, and was for a term of five years at a monthly rental of forty dollars.

The said lease contained the following covenant to wit, "Said lessee for himself, and for his executors, administrators and assigns does covenant and agree to pay or cause to be paid to said lessor, his successors and assigns, the sum of forty dollars per month and every month during said term for rent and hire of the above named premises in payments of forty dollars each on the eleventh day of each month successively to the end of the term of five years; and in case of failure on his part to pay any rent within ten days subsequent to the time as above specified, or in case of failure to conform to all the conditions of this lease, said lessor shall be at liberty to declare this lease at an end and terminated and thereupon to take immediate possession of the premises; in which case the said lessee shall be considered as tenant holding over his term."

It appears from the testimony that after the sale by Stuart to Moran, no notice of the conveyance was given by plaintiffs to Lavell; and that, when Lavell learned that plaintiffs had

bought the property, he made tender of the rent due May 11, 1909, to plaintiffs on the 22nd day of May, 1909; that Mr. Moran then refused to accept the same claiming that the rent was more than ten days over-due and that he was entitled to the possession of the premises. It in no way appears in the testimony that Mr. Lavell knew at any time before May 22, 1909 (the alleged date of the tender), that Mr. Moran had bought the place and it appears that Mr. Moran knew where Mr. Lavell was located and there seems to have been no reason why he should not have notified Mr. Lavell of his ownership of the place and demanded his rent therefor.

As a matter of fact, no demand for rent was made by the plaintiffs, prior to the tender of May 22d, 1909, or at any other time; and the sole basis of this suit is the plaintiffs' claim that by reason of the defendant's failure to pay on or before May 21st the lease was forfeited *ipso facto*, and the plaintiff became entitled to maintain this suit.

In the district court the action was tried on its merits and decision was for the defendant. In the Superior Court Mr. Justice Brown, after plaintiffs' case was closed, directed a verdict for defendant; upon plaintiff's exceptions to which direction, the case is before this court.

The only question necessary to be determined is whether, under a lease such as is in evidence in this case, it was necessary for the landlord to make a demand for the rent before the lease could be declared to be forfeited, that being the sole ground upon which the verdict was directed for the defendant in the Superior Court.

There is no doubt that, under the law, unless the necessity of a demand is specifically waived in the lease, and in the absence of a statute to the contrary, demand for the rent must be made before the lease is forfeited.

"At common law, when a forfeiture was sought to be enforced for the non-payment of rent, no distinction was made between cases where there was a sufficient distress upon the premises, and where there was not. In every case, before a landlord could enter for non-payment of rent, he must have made a per-

sonal demand for the precise sum due for the last quarter, and if the demand included any portion of the rent of a previous quarter, it would have been bad. It must also have been made on the day it became due or legally demandable;" etc. Taylor's Landlord and Tenant, Volume 2 (9th ed.) page 84, sec. 493, and cases cited. "Where a landlord has a right of re-entry for non-payment of rent, a demand of the rent either upon or after the last day which the lessee has to pay, is essential to complete the forfeiture, and enable him to maintain an action; for it is not until after the demand and non-payment that this condition is broken." Taylor's Landlord and Tenant, Volume 1, Sec. 297, page 362 and page 363 (9th ed.), and cases cited. "The general rule that to entitle the landlord to enforce forfeiture for the non-payment of rent, he must make a demand for payment, was laid down at an early date, and has since been unanimously followed." 18 Am. & Eng. Ency. of Law, 375 and cases cited (2d ed.); See also 24 Cyc. 1354, *et seq.* "In the absence of a statute providing otherwise, a demand for the rent on the day it becomes due is necessary to work a forfeiture of the lease for non-payment, unless waived by the lease." *Godwin v. Harris*, 98 N. W. 439 (Neb.), 71 Neb. 59; *Cole v. Johnson*, 120 Iowa, 667; *Rea v. Eagle Transfer Co.* 201 Pa. 273, and cases *infra*. "The claim of the plaintiff is *stricti juris*. He seeks to enforce the forfeiture; and courts always lean against penalties and forfeitures. To entitle himself to recover the possession of the leased premises, he must show that all necessary forms which the law has prescribed have been scrupulously observed. There must be a demand for the rent on the day it is due, at a convenient time before sunset. There is nothing in the terms of this lease to show that the common law requirement of demand is waived or dispensed with. Where no place of payment is named, a tender upon the land is good, and prevents forfeiture. And if the lessor desires to enforce a forfeiture, he must demand the rent upon leased premises at the most notorious place." *Chapman v. Harney*, 100 Mass. 353.

A myriad of other cases might be cited to the same effect, but it is not necessary to do so, in support of such an obvious

and well settled principle. The plaintiffs' counsel cites no case to the contrary and we know of none such. Furthermore, it has been held that a tender of the rent due, after the time when the rent is due but before a forfeiture has been declared, precludes the right of the lessor to thereafter terminate the lease because of the failure to pay rent on the day when it was due." 24 Cyc. 1353 and cas. cit. n. 37. *Burnes v. McCubbin*, 3 Kan. 221; *Tuttle v. Bean*, 13 Metc. 275; *Lewis v. St. Louis*, 69 Mo. 595; *Carondelet v. Wolfert*, 39 Mo. 305; *Jones v. Reed*, 15 N. H. 68; *Planters' Ins. Co. v. Diggs*, 55 Tenn. (8 Baxt.) 563; See also 18 Am. & Eng. Ency. of Law, 389-390 and cas. cit.

- (1) We hold, therefore, that demand by the landlord for payment of rent was necessary before he could declare a forfeiture; and that the tender by the lessee, on May 22, 1909, prior to the declaration of forfeiture, was a good tender, and precluded the landlord from thereafter declaring a forfeiture for non-payment of the rent due May 21, 1909.

The other exceptions taken by the plaintiffs are without merit and are not pressed in argument

The plaintiff's exceptions are overruled and the case is remitted to the Superior Court, with direction to enter judgment for the defendant upon the verdict of the jury as rendered by direction of the court.

John C. Quinn, for plaintiff.

J. Jerome Hahn, *P. H. Mulholland*, for defendant.

SAMUEL NEEDLE vs. H. C. BIDDLE & COMPANY, *et al.*

MAY 31, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

- (1) *Levy of Execution. Injunctions. Equity. Unanswered Case in District Court. Jury Trial.*

Respondent entered a writ in a district court against petitioner and claimed jury trial on entry day. The case was unanswered but was certified to the superior court under C. P. A., § 273 and was by the superior court returned to the district court because it was unanswered and so not in order for a

jury trial, and was defaulted in the district court. Execution was taken out and levied and bill filed by petitioner (defendant) to restrain the levy, and vacate the judgment. Preliminary injunction was granted:—On appeal *Held*, that as the bill did not allege that the judgment was obtained by fraud, or surprise, or that there was lack of service of the writ, or that there was any accident, mistake or unforeseen cause, but on the contrary showed that the whole conduct of the petitioner was mere negligence, he could not now complain of any of the proceedings taken.

Held, further, that the fact that the clerk of the district court certified the case to the superior court was an act for which the plaintiff in the action was not responsible, and did not work a discontinuance of the case.

(2) *Claim of Jury Trial on Entry of Writ. Unanswered Cases. Certification to Superior Court.*

Where a case is entered in a district court and jury trial claimed by plaintiff on entry day and such case is unanswered the provisions of C. P. A., § 271 (Gen. Laws, 1909, cap. 286, § 6) control C. P. A., § 273 (Gen. Laws, 1909, cap. 286, § 8) and the case should remain in the district court and be there defaulted, as no issue has been made needing a jury trial.

(3) *Equity. Meritorious Defence Necessary Allegation for Relief. Executions.*

Held, further, that the bill was fatally defective in that it contained no allegation that complainant had any defence to the original action.

(4) *Executions. Injunctions. Equity. Defence to Action.*

It is a well settled principle of equity that an injunction will not issue to restrain the levy of an execution or vacate a judgment unless it appears from the bill that the complainant has a meritorious defence to the action.

BILL IN EQUITY to restrain levy of an execution. Heard on appeal from decree of superior court granting injunction and appeal allowed.

PARKHURST, J. This is a bill in equity to restrain the levy of an execution and to vacate a judgment; and the case is before this court on respondents' appeal from a decree of the Superior Court, granting a preliminary injunction restraining the respondents from proceeding with the levy and sale under execution.

H. C. Biddle & Company entered a writ in the Tenth District Court against Samuel Needle on December 28, 1909, and the plaintiff claimed a jury trial on the entry day. The case was not answered; but it was certified to the Superior Court, on the

next court day after entry, under C. P. A., § 273, and when it reached the Superior Court it was returned to the Tenth District Court because it was unanswered and so was not in order for a jury trial, and was defaulted in said District Court on April 25, 1910. Execution was taken out and levied; and on June 3rd, 1910, this bill was filed by Needle in the Superior Court to restrain the levy of execution, and to vacate the judgment. July 20th, 1910, the Superior Court entered a decree for a preliminary injunction, enjoining the levy and sale until further order, and from this decree the respondents appealed to this court.

- The bill nowhere alleges that the judgment was obtained by any fraud, accident or surprise, or that there was lack of service of the writ, or that the complainant failed to appear and plead to the action and to defend the same, by reason of any accident or mistake or unforeseen cause. It shows no reason or excuse whatsoever for the complainant's failure to appear, and defend the action; it is not even alleged that he employed an attorney to appear for him; and, so far as appears, is entirely consistent with an intention on his part not to defend the action but to allow it to be defaulted. His first appearance before the Tenth
- (1) District Court appears to have been in May, 1910, after judgment had been entered by default, and execution issued and levied on his goods and chattels, when he moved said district court to stay execution and vacate the judgment, on the ground that the certification to the Superior Court, of this unanswered case for a jury trial, its remaining there for some days, and being subsequently sent back to the District Court, and its final disposition there by the entry of judgment by default, was irregular and operated as a discontinuance of the case. The whole conduct of the complainant, as shown by his bill, was mere negligence, and he cannot be heard now to complain of any of the proceedings taken, when it was within his power, if he had seen fit, to have appeared and defended the suit at the proper time. It is no matter for surprise that the District Court refused to stay execution and vacate its judgment, if the complainant (then defendant) made no better showing of reasons therefor than now appear in his bill in equity.

- Furthermore, the plaintiff in the original action did nothing with regard to the removal of the suit from the District Court to the Superior Court, except to claim a jury trial in writing upon the entry day of the writ, as he had a right to do, under C. P. A. § 272. The mere fact that the clerk of the District Court sent the papers to the Superior Court, without waiting to see whether the case was answered or not, was not due to any act or fault on the part of the plaintiff, but was due merely to a failure on the part of the clerk to fully appreciate the provisions of C. P. A., § 271, providing for continuance of unanswered cases for one week and their subsequent default in case they remain unanswered, and to consider the provisions of said § 271 as paramount to and controlling the provisions of § 273, regarding certification of cases to the Superior Court for a jury trial. It was a perfectly proper proceeding for the Superior Court to send back the papers to the District Court, under these circumstances, as it appeared to be an unanswered case which should have remained and been defaulted in the District Court, and in which no issue had been made which needed a jury trial. All these proceedings of certification by the clerk of the District Court, and remission by the Superior Court, were done without any intervention of the plaintiff, in the suit and did not in any way work a discontinuance of the case and should not be allowed to work any prejudice to the plaintiff in the maintenance of his suit. The defendant in the suit had, by the service of the writ, all the notice of the pendency of the suit to which he was by law entitled; he is not shown to have been injured by reason of any of the proceedings of which he now complains, and in view of his utter negligence and failure to show any cause, we think the District Court was right in refusing to stay its execution or to vacate its judgment and reinstate the case for trial.
- (2) But the bill is fatally defective in another essential particular. It contains no allegation, or even suggestion, that the complainant had or has any defence whatever to the original action.
- (3) It is a well settled principle of equity that an injunction will not issue to restrain the levy of an execution or vacate a
- (4)

judgment unless it appears from the bill that the complainant has a meritorious defence to the action. "It is not the province of equity to correct mere technical wrongs. A party seeking its aid must show some substantial injury. It frequently happens that a judgment is obtained by fraud, accident or surprise, although the same result would be reached if an adversary trial had been had. In such a case the defendant at law is equitably bound to pay the amount of the judgment, and equity will not interfere to relieve him. The fraud, accident or surprise is, in such a case, mere technical wrong. Hence it is laid down that equity will not relieve from judgments in general, unless a meritorious defence is shown, so that on re-examination and re-trial of the case the result would be different. This rule is universal as to judgments obtained merely by fraud, accident or surprise. In cases where the ground of attack on the judgment is want of jurisdiction, as where there is no service of summons, there is a conflict of authority; but the prevailing view is that even there a good defence on the merits must be shown." 6 Pomeroy's Eq. Jur. § 667. See also 1 Black on Judgments, §§ 347, 348.

As we have shown above the judgment in this case is not alleged to have been obtained by fraud, accident or surprise; nor does it appear that there was any want of jurisdiction, for lack of service or for any other reason.

This court has gone to the full extent of the doctrine quoted above from Pomeroy, in the case of *Opie v. Clancy*, 27 R. I. pp. 42, 47, 50. That case was much more extreme than the present, as the court found that the trial justice who heard it was without jurisdiction to do so, whereas there is no question in this case as to the jurisdiction of the court. The court say: "Our finding that the assistant justice was unauthorized to act in the premises, however, is not decisive of the case." . . . "It is a rule that applications for relief in equity against judgments at law will be scrutinized closely, and that an injunction to prevent the enforcement of the same will not be granted except upon facts which show the clearest and strongest reasons for the interposition of chancery; that courts will not entertain a party seeking for relief against a judgment which

has been rendered against him in a court of law in consequence of his default in regard to steps which he might successfully have taken in the court of law, unless some reason founded in fraud, surprise or some adventitious circumstances beyond the control of the party is shown to excuse such default. Am. & Eng. Ency. L. 2d. ed. vol. 16, p 374.

"Where a party having a meritorious defence is by accident, unmixed with negligence on his part, prevented from making his defence or from taking steps for the preservation of his rights," . . . "a court of equity has power to grant relief by enjoining the judgment. Mere accident, however, though unmixed with negligence of the party, will not of itself furnish a ground for relief in equity." . . . "It must clearly appear to the court that it would be contrary to good conscience to allow the judgment to be enforced; in other words, a meritorious defence must be alleged and proved; it must appear that the accident was unavoidable, and in no way attributable to the negligence of the party seeking equitable relief."

In view of these well settled principles, we are of the opinion that the complainant has utterly failed to show any right to the interference of a court of equity for his relief; that the decree of the Superior Court granting a preliminary injunction was erroneous, and must be vacated.

The respondent's appeal is therefore allowed and the cause is remanded to the Superior Court with direction to vacate the decree appealed from, and for further proceedings.

Peter J. Quinn, for complainant.

Edward C. Stiness, Frederick W. O'Connell, for respondents.

MABEL SWEENEY, *p. a.* vs. FRANK D. MCKENDALL.

JUNE 1, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Amendment of Pleadings After Opening to Jury.*

While a party has not the right to amend pleadings as of course, after a case has been opened to the jury, yet the court may in its discretion upon proper terms permit it, and where the opposing party does not ask for a continuance but goes to trial on the amended declaration, he has no ground of exception.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant, and overruled.

BLODGETT, J. This is an action of trespass on the case for negligence brought to recover damages for personal injuries sustained by the minor plaintiff on October 15th, 1903, by reason of a piece of brick falling from the control of the defendant, while repairing a chimney, and striking the plaintiff on the head and inflicting certain injuries thereto. The cause was tried in the Superior Court on May 23d, 24th and 25th, 1910, before a jury, resulting in a verdict for the plaintiff in the sum of \$550, and thereafter a motion for a new trial was denied by the trial justice. The defendant during the progress of the cause took exception to certain rulings of the Superior Court, which are set out in his bill of exceptions and constitute the matters now before this court.

The defendant's first exception is to a ruling of the court previous to the trial, overruling a demurrer to the amended declaration. His third exception is that the trial justice, after the case had been opened to the jury, permitted a further amendment to the declaration in these words, referring to the plaintiff "having been invited thereon by the occupants of the said adjoining premises," the effect of which it is admitted was to constitute the plaintiff an invitee thereon and not a mere licensee as set forth in the declaration before said last amendment.

- (1) While a party has not a right to amend his pleadings as of course after a case has been opened to the jury (*Hall v. Greene*, 24 R. I. 286), it is nevertheless within the power of the court in its discretion to permit an amendment, of course granting to the opposing party a continuance if he claims to be surprised thereby, and an opportunity to demur or plead to the pleading thus amended and to impose terms as to payment and recovery of costs and otherwise as the circumstances of each case may require. In the case at bar the defendant did not ask for a continuance or for time to demur or plead to the declaration as thus amended and went to trial on the issues raised by the general issue of not guilty theretofore filed.

We are of the opinion that the action of the court in permitting such second amendment disposed of the defendant's demurrer to the declaration as it theretofore stood and that he takes nothing by his exception to the ruling of the court overruling the same. Also that not having asked for a continuance, and having gone to trial on such amended declaration he now has no ground of exception to the same. The declaration having been thus amended the defendant's exceptions to the admissibility of evidence showing an invitation avail him nothing inasmuch as the fact of such invitation was one of the issues then raised by the pleadings.

Upon a review of the evidence we see no reason to depart from the rule heretofore laid down by this court in cases where the verdict has been approved by the trial justice, as set forth in *Wilcox v. Rhode Island Co.*, 29 R. I. 292.

Defendant's exceptions overruled and case remitted to the Superior Court with direction to enter judgment on the verdict.

Cooney & Cahill, for plaintiff.

Thomas A. Carroll, Walter P. Suesman, for defendant.

WILLIAMS & FLASH COMPANY vs. J. PERRY CARPENTER.

MAY 29, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Contracts. Guaranty. Offer.*

Defendant, a stranger to the plaintiff and the father of the president of its corporate debtor, wrote to plaintiff explaining the condition of the debtor, and the status of plaintiff's account, and gave his opinion that time was needed and expressed the hope that plaintiff would be liberal with debtor, adding the statement "and you will get every dollar due you. Understand that your claim will be in any event preferred." "In either case it calls for time which I feel you will agree with me you should grant them under the circumstances if you can be *assured* you are not to suffer by the delay. Trusting you will consider this carefully before taking any step that would add to their further embarrassment and with my *assurance* that your interests will be protected *by them*."

Plaintiff replied thanking defendant for the information and stated that a proposition had been written to defendant's son which he would doubtless submit to defendant, which proposition was a suggestion that the corporation note with endorsement of defendant, among others, be given plaintiff.

Plaintiff claiming that defendant by his letter guaranteed its claim brought suit to recover on such guaranty:—

Held, that the letter could not be construed as such a guaranty but even if sent and received as an offer of guaranty, it was not accepted by plaintiff who submitted a proposition thereafter to the son of defendant, which was never accepted.

ASSUMPSIT. Heard on exceptions of plaintiff and overruled.

DUBOIS, C. J. This is an action of assumpsit on an alleged contract of guaranty. The case was brought and tried in the Superior Court before the presiding justice thereof, sitting without a jury, who found for the defendant in the following decision: "It does not seem to me that this amounts to a guarantee to pay the debt of another. It is more advisory and by way of assurance than anything else. Its strongest expressions are those expressions that 'time is what they need,' and 'will get every dollar due you,' and 'my assurance your interest will be protected by them.' It does not seem to me that that clearly expresses any promise to pay the debt of another. It is more in the way of advice, and expressions of opinion on the part of the writer of the letter. For that reason I will give decision for the defendant."

The plaintiff duly excepted to the aforesaid ruling and the case was heard by this court upon the plaintiff's bill of exceptions.

The plaintiff, a corporation doing business in the city and state of New York, had furnished goods to and was a creditor of the Eastern Oil & Supply Co., also a corporation doing business in the city of Providence, R. I., in the sum of \$2,902.26 for goods theretofore sold and delivered. October 18, 1907, the Eastern Oil & Supply Co., wrote the following letter to the plaintiff corporation which was duly received by it on the following day:

“WILLIAMS & FLASH Co.,
80 Pearl Street,
New York City.

GENTLEMEN:—Yours in regard to our account at hand, and in reply beg to make the following statement of our affairs, as we have found them after a thorough examination. Mr. Sayles who was treasurer and manager of our Company we find has taken every thing he could lay his hands on, and through fraudulent entries on our books, collected and used the monies that we supposed was being paid to our creditors. When we discovered that things were wrong, our books showed that we had a cash balance more than sufficient to pay every outstanding obligation. Enquiry at the bank showed we had a balance of only three hundred and fifteen dollars (\$315.00). An audit of our books also showed that he had collected large amounts that still stood to our credit, leaving our outstandings very much less than we had supposed. After my visit to New York we felt assured that you would be willing to arrange with us in such a way that might secure your claim in full, and with that end in view, we took steps to dispose of Mr. Sayles as best we might. Knowing that it would be impossible to continue the business with him in any way connected, and the only thing we could see our way clearly to do was to make him surrender his stock and get out. We could have prosecuted, but were not in a position to dictate as he was a defaulter to another corporation of which he was treasurer, to the amount of fifteen hundred dollars (\$1,500), and to four individuals to the extent of fifteen thousand dollars (\$15,000.)

“While we admit the justice of your claim, and the fact that as a corporation we are liable for the acts of our treasurer, we also feel that it is a hardship to punish the other innocent officers for his crime. He had collected the money for the oil you had consigned, and the bills had been turned over to him to pay and he had claimed to have paid them, and we had no reason to suppose he had not, for as stated above our books showed him to have ample cash to do so.

"Now that we have disposed of him, we are arranging to put in an additional capital and continue. Our condition is practically this, we have good accounts receivable of about \$2,500.00, stock \$2,500.00 and cash in the bank of about \$500.00, we owe about \$5,500.00. On our accounts and stock in ware-house we could secure you, so you could be paid in full.

"Should you however, feel that you must take other steps, then you would prevent our carrying out of our plans—force us into liquidation and punish the innocent members of our corporation who are already losers by Mr. Sayles for the amount of their stock, and a very large amount besides. This adjusting of our affairs we cannot consummate in a day—consequently we could not settle with you as you propose, two thousand cash (\$2,000) cash at once, and balance in ten days,—it will be necessary absolutely, that we be given a reasonable time too, and as a business proposition, to business men, when you consider our condition and the causes, would not some assurance that your account will be paid in full, with some security on our account, or ware-house receipts for our clean salable stock, satisfy you better than our prosecution for the acts of Mr. Sayles, who has robbed us of cash for more than twice the amount of your account.

"We are entirely in your hands, and if given the necessary time we can continue and pay you in full. We will await your reply, and if you are favorably disposed, would like to meet you either here or in New York and arrange this so that we can both be fully secured.

Very truly yours,
EASTERN OIL & SUPPLY CO.,
FRED L. CARPENTER,
President and General Manager."

On the same day the defendant sent the following letter to the plaintiff:

"THE WILLIAMS & FLASH CO.,
New York, N. Y.

GENTLEMEN:—I trust you will pardon me for writing you in reference to the Eastern Oil & Supply Co. of this city of which my son is Pres. With an expert accountant I have just completed an audit of their books and understand just the status of your account. Your goods were sold by Mr. Sayles either C O D or with Draft attached and he took the money and claimed that he had paid you which of course was false. Mr. Sayles was not only a defaulter to the Eastern Oil for some \$7000. but to the Gilbert Parker Co for \$1400. to my son for \$2200. furnished by myself, to two other parties \$3000. and to my self for a very large amount. The boys as I call them had a nice little business started which he has ruined unless some one helps them out. I see no reason why your account cannot be paid in full but it will need a little time to adjust their affairs and I trust you may see your way to be liberal with them when you consider that the remaining stockholders are innocent as Mr. Sayles had their full confidence and was Manager and Treas. Time is what they need and you will get every dollar due you. Understand that your claim in any event will be preferred. Their other creditors are disposed to give them all the time necessary. This defalcation of course wipes out their stock and leaves two ways out for them—one to make an assessment on the stock and all contribute, or if my son has to look to me to help him out you could not expect me to furnish capital for the other stockholders. They hold a meeting tomorrow or Monday and if the other parties do not care to furnish more capital then we have another plan. In either case it calls for time which I feel you will agree with me you should grant them under the circumstances if you can be assured you are not to suffer by the delay. You are business men like myself and every little while I have similar cases come up in my own business, and I never feel that I ought to sacrifice men so long as my money is in sight and a little patience will get it. Trusting you will consider this carefully before taking any step that

would add to their further embarrassment, and with my assurance that your interests will be protected by them.

I am, very truly yours

J. PERRY CARPENTER."

The plaintiff acknowledged the receipt of each of these letters and thereto made the following replies:

"NEW YORK Oct 19, 1907.

"EASTERN OIL & SUPPLY Co.,
Providence R. I.

GENTLEMEN:—We have your favor of the 18th inst., which has our careful attention.

What you state sounds to us fair and reasonable and we are not at all disposed to push you to the wall or inflict any unnecessary hardship. On the contrary, you certainly have our sympathy under the circumstances.

To help you out in this matter, we will make you the following proposition, that you give us a note of your corporation, endorsed by your Mr. Carpenter's father and himself personally, and by one of Mr. Sayles' relatives, either his mother, his father-in-law or his grandfather, attaching to this note the warehouse receipt for your stock, as you suggest, making this note for thirty (30) days, or if that's not time enough for you, make it 60 days.

It seems to us that this certainly would be a fair proposition and should think that Mr. Sayles' relatives would be willing to give their endorsement, as we certainly have it in our power, if we so elected, to land him in penitentiary. We feel a good deal like doing it, too, as we feel that we have been so outrageously swindled by him.

We would be very glad to meet your President or his father, or both, here at any time at your early convenience, as we would like to have the matter settled up promptly. We are making this proposition because we feel that you are dealing fairly and

squarely with us now and we wish to do anything reasonable to help you.

Yours truly,
THE WILLIAMS & FLASH COMPANY,
E. FLASH Jr. Vice Prest."

"NEW YORK Oct. 19th, 1907.

"MR. J. PERRY CARPENTER,
c/o Messrs. Ford and Carpenter.
Providence, R. I.

DEAR SIR:—We have your favor of 18th inst. and beg to thank you for the information therein.

We have not the slightest desire to push the Eastern Oil & Supply Co. to the wall; on the contrary, are willing to do anything we could reasonably be expected to do, to help them out and let them get on their feet again, and even afterwards to continue to do business with them, as we will say frankly that when your son, Mr. Carpenter, called upon us we were favorably impressed with him as being manly, straightforward and honest. We have written him to-day a proposition which he will doubtless submit to you, and will be glad to see him or you, or both of you, at any time it might suit your convenience to call upon us here in the near future. The writer cannot very well leave New York now, owing to press of business.

Very truly yours,
THE WILLIAMS & FLASH COMPANY,
E. FLASH JR. Vice Prest."

Subsequently the following correspondence passed between the parties:

"NEW YORK Oct. 28th, 1907.

"MR. J. PERRY CARPENTER,
c/o Messrs. Ford & Carpenter.
Providence, R. I.

DEAR SIR:—Referring to your favor of 18th inst. and to our answer thereto dated 19th inst., we were very much surprised

to receive a call on the 25th inst. from Mr. O. F. Gallagher, attorney at law, stating that the Eastern Oil & Supply Co. were going into bankruptcy unless we were willing to accept about 50 cents on the dollar for our claim against them.

This is *entirely* at variance with your above letter, in which you gave us *positive assurance that our interest would be protected* and we would like to ask you now what you propose to do about it, if we give reasonable time, under proper security, for the settlement of this debt?

We would appreciate your prompt reply.

We have consulted our counsel here in the matter, but before taking any legal steps, we feel like hearing further from you. We certainly do not intend to accept any compromise of 50 cents on the dollar for money that has been stolen from us, and for which the law gives a remedy.

Very truly yours,
THE WILLIAMS & FLASH COMPANY,
E. FLASH JR. Vice Prest."

"PROVIDENCE, R. I. Oct 29th 1907.

"THE WILLIAMS & FLASH Co
New York N Y

GENTLEMEN:—Yours of 28th inst at hand and contents noted. Understand I am in no way connected with the business of the Eastern Oil & Supply Co and in no way responsible for their debts. When I wrote you a personal letter on the 18th inst. apparently they were in a solvent condition. However when they started to verify their Book accounts they found that a large amount that appeared to be due them had been collected and not reported. That the stock in Store house did not tally with their stock sheets and that they were hopelessly insolvent. Then before they could take any steps to secure aid came your letter calling for a short note to be indorsed by people who you named but who were not interested in their affairs neither under the circumstances could they be. Personally I resented your position and advised as their best course to consult some

good Attorney and be governed by his advice. There my connection with the affair ceased. In regard to what you propose to do or not, that is your own affairs not mine. In regard to the statements you made to Mr. Gallagher in your office—so far as they concern myself—and the threats implied in your letter, I think after a little deliberation you will decide to have been unwise and will regret.

If your counsel advise you there is a word in my former letter where I assume the responsibility for the debts of anybody, then I would suggest you dismiss him and make a change at once. After 35 years of experience I am too old not to know my legal rights, or to be forced or bullied into such a false position as you would apparently attempt.

Personally again I regret for your sake that you should have been advised to write me in the manner and tone you have, as I believe it to be contrary to your own better judgment.

Regretting the necessity of writing you thus plainly, I am

Very truly yours

J PERRY CARPENTER."

"PROVIDENCE, R. I. Oct 31st 1907.

"THE WILLIAMS & FLASH Co

New York N Y

GENTLEMEN:—In reply to yours of the 29th inst., can only repeat my position as stated in my letter of 29th inst to you. If you wish to discuss this matter further with me, it must be from a different standpoint, leaving out its personal and objectionable features, so far as they apply to myself.

No one regrets this unfortunate affair with its attendant losses more than myself.

My losses by this scoundrel have been heavy, and my pride somewhat humbled, but my personal honor, and integrity, are not at stake at this time, and are not being questioned by people who have known me all my life and know me best.

Very truly yours

J PERRY CARPENTER."

And still later counsel for the plaintiff wrote to the defendant as follows:

“PROVIDENCE, R. I. December 4, 1907.

“J. PERRY CARPENTER, *Esq.*,
Providence, R. I.

DEAR SIR:—The Williams & Flash Company have referred to me the matter of their claim against the Eastern Oil and Supply Company guaranteed by you in your letter to Williams and Flash Company dated October 18, 1907. As bankruptcy proceedings are pending against the Eastern Oil and Supply Company, commenced at the instance and in the interest of the Eastern Oil and Supply Company, as shown by the fact that the petitioning creditors appear on the record by the attorney of the Eastern Oil and Supply Company, Williams and Flash Company consider that the time has come to require of you a performance of your contract of guaranty, and I am instructed to demand that you pay the claim guaranteed by you, Williams and Flash Company hereby offering to transfer and assign to you their claim against Eastern Oil and Supply Company whenever you perform your contract.

Very truly yours,

C. M. VAN SLYCK.”

- (1) The plaintiff claims that the defendant in his letter of October 18, 1907, hereinbefore set forth, guaranteed its claim against the Eastern Oil & Supply Company. A brief analysis of the contents of the letter may be useful in the present consideration. It purports to come from a stranger to the plaintiff, who introduces himself with an apology, as the father of the president of its corporate debtor. It continues with an explanation of the manner in which the writer has arrived at an understanding of the status of the creditor's account. Information is offered that the goods of the creditor had been sold and the proceeds of the sale together with other large sums of money had been appropriated by a defaulter and the prophesy is ventured that the “boys nice little business” will be ruined

unless some one helps them out. The writer sees no reason why the account cannot be paid in full but gives his opinion that time will be needed, and hope is expressed that the creditor will be liberal with the debtor. The necessity for time is again alluded to and to this is added the statement "and you will get every dollar due you. Understand that your claim in any event will be preferred." Reference is made to the disposition of the debtor's other creditors to give time. The effect of the defalcation upon the stock is pointed out and one method of procedure, by assessment, in which all stockholders should contribute, is suggested, but the writer in this connection remarks that if his son has to look to him for help he could not be expected to furnish capital for other stockholders. The suggestion is made that if this plan fails they have another, but that either plan calls for time which the writer feels that the creditor will agree with him should be granted if it could be assured it was not to suffer by the delay. The hope is expressed that careful consideration by the creditor will precede any steps taken to further embarrass the debtor and the letter concludes with the writer's assurance "that your interests will be protected by them." It is true that the words "assured" and "assurance" are used in the letter, but the question at once arises,—were they used in a technical sense? It is common knowledge that letters sometimes conclude with profound assurance of most distinguished consideration. Such might be said to contain a guaranty of the politeness of the writer, but hardly of anything else. Considered with their context, what do they mean? Take the sentence in which the word *assured* appears: "In either case it calls for time which I feel you will agree with me you should grant them under the circumstances if you can be *assured* you are not to suffer by the delay." This means no more than if you can be satisfied or convinced, that you are not to suffer by the delay. Even if it could be held that the word meant "guaranteed against loss by the delay," it is not even an offer to give such a guaranty, it is merely the statement of an impression which the writer claims to have. The word "assurance" occurs in the final

sentence of the letter: "Trusting you will consider this carefully before taking any steps that would add to their further embarrassment, and with my *assurance* that your interests will be protected *by them*."

I am, very truly yours."

Did the writer thereby intend to guarantee the payment of the claim of the plaintiff? He does not say so. He desires to convince the plaintiff of his firm belief that its debtor will protect its interest. But it is important not only to determine what the defendant meant by his letter but also what the plaintiff understood him to mean thereby, and its actions at or about the time of the reception of the letter may speak louder than its words thereafter. If the letter was sent and received as a tender or offer of guaranty and in that respect was entirely satisfactory to the plaintiff, was the same promptly accepted? Did the plaintiff forthwith write to the defendant and say: your assurance or guaranty of overdue account in consideration of further time for payment of the same is hereby accepted, how much time do you want, or anything like that? No, nothing of the sort. On the contrary it wrote and thanked the defendant for the information contained in his letter, alluded to the favorable impression made upon it by the son of the defendant and mentioned the fact that a proposition had been written to him which he would doubtless submit to the defendant. Was the proposition submitted an acceptance of the guaranty of the defendant? Not at all. As already appears it was: "that you give us a note of your corporation, endorsed by your Mr. Carpenter's father and himself personally, and by one of Mr. Sayles' relatives, either his mother, his father-in-law or his grandfather, attaching to this note the warehouse receipt for your stock, as you suggest, making this note for thirty (30) days, or if that's not time enough for you, make it 60 days." So far as appears this is the only proposition ever made in this behalf by the plaintiff, and it was never accepted. The position now taken by the plaintiff, that the defendant guaranteed its claim against the Eastern Oil & Supply Co., is evidently

an afterthought. For aught that appears the minds of the parties never met on the subject. The burden of proof to show the existence and breach of a contract of guaranty is upon the plaintiff who has utterly failed to sustain the same. In these circumstances the decision of the Superior Court was clearly right.

The plaintiff's exceptions are therefore overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant.

C. M. Van Slyck, Frederick A. Jones, for plaintiff.

William A. Spicer, Jr., Frank H. Swan, Edwards & Angell, for defendant.

HARRIET B. SPRAGUE vs. CHARLES W. STEVENS, *et al.*

MAY 26, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Equity. Dower. Superior Court.*

The Superior Court has jurisdiction of suits for dower under its general equity powers.

(2) *Demand for Assignment of Dower.*

A demand for assignment of dower is not necessary to maintain a suit in equity by a widow for dower either under the general equity jurisdiction of the Superior Court or under Gen. Laws, 1909, cap. 329, § 15.

(3) *Writ of Dower. Detention. Damages. Demand.*

Gen. Laws, 1909, cap. 329, § 7, is in derogation of common law right, and must receive strict and literal construction, and relates solely to proceedings by writ of dower, and furnishes the exclusive remedy for detention of dower and recovery of damages therefor, and while demand by the widow is necessary under such statute, neither allegation nor proof of demand is required in equitable suits for recovery of dower.

(4) *Dower. Description of Estate of Husband.*

In an equitable suit for assignment of dower, an allegation that complainant's husband was seized in fee simple and possessed of the lands out of which dower is sought, is a sufficient allegation of his estate therein.

(5) *Dower. Description of Estate of Husband.*

In an equitable suit for assignment of dower, it is an essential allegation that

the husband in his life time and during the intermarriage was seized and possessed of an estate of inheritance in the lands out of which she seeks to be endowed. But this requirement is fulfilled by an allegation that he was within such time seized and possessed of the lands in fee-simple.

(6) *Dower. Description of Lands.*

In such suit where the several original tracts as owned by the husband are described by metes and bounds and by reference to the deeds and the records thereof by which the husband acquired them, it is unnecessary for the complainant to describe subsequent subdivisions of the tracts. All that is necessary is for the widow to show that during her coverture the husband was seized of an estate of inheritance in certain lands which were conveyed by him and in which she has not relinquished her right of dower.

(7) *Dower. Defence to Bill.*

It is not necessary for such bill to show whether the husband deceased testate or intestate or whether the widow accepted any provision of a will in lieu of dower. It is a matter of defence.

Neither is it necessary to aver that the husband did not die seized of lands in which the widow is dowable other than those described in the bill. That is also a matter of defence.

(8) *Equitable Suit for Assignment of Dower. Joinder of Parties Respondent.*

In an equitable suit for assignment of dower it is necessary that the owners of all the land in which the widow claims to be dowable should be joined under the provisions of Gen. Laws, 1909, cap. 329, § 15.

(9) *Dower. Description of Property of Respondents.*

In an equitable suit for assignment of dower the widow may join divers respondents without stating what their respective interests are in the several pieces of property, since they may well be supposed to have better sources of information than complainant.

(10) *Allegation of Ownership in Respondents. Dower.*

In an equitable suit for assignment of dower a general allegation of ownership in the respondents and the source of their title is sufficient to apprise them of the complainant's claim in that particular and is enough to put them upon their defence.

(11) *Equity. Dower, in Less Than all Lands of Which Widow Dowable.*

A bill in equity for assignment of dower which seeks to have dower set off in any less than all the lands of which the widow is dowable at the time of bringing the suit cannot be maintained under Gen. Laws, 1909, cap. 329, § 15.

Such a bill might be maintained under the general equity jurisdiction of the court, for separate suits could be brought to have dower assigned out of each several parcel of land.

(12) *Dower. Lands Conveyed by Husband.*

A widow is not entitled to have dower set off to her out of lands conveyed to others by the husband in his lifetime, if the husband at his decease was

seized and possessed of other lands out of which her dower might be assigned.

(13) *Dower. Joinder of all Parties Owning Land in Which Dower is Sought.*

A bill in equity for assignment of dower brought under Gen. Laws, 1909, cap. 329, § 15, which is the exclusive remedy for the purpose of obtaining an assignment of dower in several parcels of land in one suit, must be brought against all persons owning the land out of which dower is sought, although it is not necessary to include those with whom settlements had been made.

(14) *Equity. Dower. Multifariousness.*

A bill in equity under Gen. Laws, 1909, cap. 329, § 15, may be brought against any number of respondents irrespective of their community of interest in the lands out of which dower is sought.

(15) *Dower Set Off in Special Manner.*

Gen. Laws, 1909, cap. 329, §§ 2 and 17 recognize the fact that peculiar conditions may exist wherein it will be equitable to set out dower in an extraordinary manner and the provisions of § 17 are broad enough to include a suit in equity under § 15. Such a bill might also be maintained under the general equity jurisdiction of the court.

(16) *Dower. Described Owners of Tracts.*

Where a bill in equity seeks to have dower set off out of several tracts it need not show who are the owners at the time of the filing thereof of each of the tracts described, if it shows who are the owners of all the tracts.

BILL IN EQUITY for assignment of dower. Certified under Gen. Laws, 1909, cap. 289, § 36, for determination of questions.

DUBOIS, C. J. This is a bill in equity, brought by the widow of Amasa Sprague against Charles W. Stevens and over seven hundred other respondents, for the purpose of obtaining an equitable assignment of her dower, out of the lands held by them, whereof her said husband was seised of an estate of inheritance during their intermarriage to which she has not relinquished her right of dower. The lands, whereof she claims to be dowable, were conveyed to her husband, prior to their intermarriage, November 12, 1873, and were mortgaged and conveyed by him thereafterwards by deeds to which she was not a party and wherein she did not release her right of dower. The lands were conveyed to her husband as fourteen separate tracts or parcels, and only a portion of the land was platted into house lots or subdivided until after he had conveyed the same. Amasa Sprague died August 4, 1902, but the respond-

ents have never assigned to the complainant her dower in said lands. In her prayer for relief she asks that the respondents account to her for the rents and profits of said lands; that one-third of them may be assigned to her during her lifetime for her dower; that "if it be found that said lots of land are held in severalty by these respondents so that her dower therein cannot be reasonably or justly assigned to her in said several parcels of land by metes and bounds," then fixed rentals, to be paid to her at stated periods by the respondents or later owners of said lots of land, may be substituted and remain fixed charges upon all the lands; that commissioners may be appointed to assign to her her dower in the said lands and that the respondents may be decreed to produce all their title deeds, evidences and writings relative to said lands or any of them in order to assist in the assignment of her dower. To the bill of complaint certain respondents have demurred for various reasons. The following will serve as a sample of the grounds of demurrer generally relied upon:

"First: That it does not appear in said bill that said Amasa Sprague was in his lifetime, and during the time that he was married to the petitioner, seized and possessed of the lands described in said bill, to his own use and benefit.

"Second: That it does not appear in said bill that the petitioner has ever demanded of this respondent that dower be set off to her out of said premises.

"Third: That the description of the premises in which said dower right is claimed, is indefinite and uncertain.

"Fourth: That this respondent is unable from the description given of said premises to say whether or not he has any claim or title to certain parcels thereof.

"Fifth: That it does not appear in said bill that said Amasa Sprague at the time of his decease was not seized and possessed of any other lands than those mentioned in said bill out of which the complainant's dower might be assigned.

"Sixth: That it does not appear in and by said bill whether the several respondents named therein are joint owners of all the premises mentioned in said bill or of some or any one of the

parcels described therein, or some particular part thereof, or whether each is the owner of a certain definite parcel or part thereof, or whether each is the owner of some indefinite and undescribed part thereof.

"Seventh: That said bill is uncertain and insufficient because it does not show the ownership of each of the several tracts of land described therein:

"Eighth: That said bill of complaint is multifarious for the reasons set forth in the preceding grounds of demurrer."

After hearing arguments upon the demurrers in the Superior Court the case was certified to this court under the provisions of Gen. Laws, 1909, cap. 289, § 36, for determination of the following questions:

"1. Whether the Superior Court of this state has jurisdiction of suits for dower under its general equity powers.

"2. Whether a demand for assignment of dower is necessary to maintain a suit in equity by a widow for dower under the general equity jurisdiction of said court.

"3. Whether such a demand is necessary in order to maintain such a bill under section 15, chapter 329 of the General Laws.

"4. Where a widow seeks to have dower set off to her by a bill in equity, should it appear in said bill that she has demanded of the respondents named therein, the then owners of the property out of which she seeks to have dower set off to her, that dower be set off to her out of said property?

"5. Whether an allegation that the complainant's husband was seized in fee simple and possessed of the lands out of which dower is sought, is a sufficient allegation of his estate therein.

"6. Where a widow seeks by a bill in equity to have dower set off to her, should it appear in said bill that her late husband was in his lifetime and during the time that he was married to the petitioner seized and possessed of an estate of inheritance in the lands out of which she seeks to have dower set off to her to his own use and benefit?

"7. Whether in such a bill where the several original tracts as owned by the husband are described by metes and bounds

and by reference to the deeds and the records thereof by which the husband acquired them and the subdivision of said original tracts are exceedingly numerous, it is necessary for the complainant to describe each of said lots or subdivisions.

"8. Where a widow seeks to have dower set off to her out of certain lands, is the description sufficiently definite and certain (a) if it only described said property according to a description contained in ancient deeds and the record thereof, without any reference to existing bounds; (b) if it only describes said property according to its description in ancient deeds and the record thereof where said property has been divided into parcels and conveyed to divers parties, without any reference to existing bounds or description of said divers parcels; (c) if it only describes certain land merely by reference to a certain deed, stating where said deed is recorded; (d) if it only describes said property as bounded upon land of divers parties who have long since parted with the title to said land; (e) if it only describes said land according to the description contained in certain ancient deeds and the record thereof and states that there is excepted therefrom certain lots of land which have been sold to other parties at a certain sale, without particularly describing said lots of land; (f) if after giving the description contained in certain ancient deeds and the record thereof, it thereupon states that said lots or parcels include a portion of a certain plat of house lots, without stating what portion; (g) if the land is only described by giving the bounds on three sides, without giving the bound of the fourth side; (h) if the land is described only as occupied and owned by the grantor, without stating who the grantor is, is bounded on the grantee's land in part, without stating who the grantee is, and is bounded on the grantor's land in part, without stating who the grantor is?

"9. Whether it is necessary in any bill for the assignment of dower to allege that the complainant's husband died intestate, or that he died testate and the complainant has not accepted any provision of his will in lieu of dower.

"10. Whether in such a bill it is necessary for the complainant to allege that her husband did not die seized of lands

in which the widow is dowable other than those described in the bill.

"11. Whether a bill in equity brought against more than seven hundred owners of distinct and separate lots of land into which several large, separate and distinct tracts of land described in the bill have been subdivided partly before and partly after the alienation thereof by the husband and which seeks to have dower assigned, not by metes and bounds but from the separate lots into which the land has been subdivided in a special manner, can be maintained without joining the owners of all other lots and subdivisions of the same tracts, under the general equity jurisdiction of the court or under sec. 15 of chap. 329.

"12. Can a widow seeking to have dower set off to her out of certain property by a bill in equity, join therein divers respondents to the number of over eight hundred without stating what their respective interests are in the several pieces of property out of which she seeks to have her dower set off to her?

"13. Whether a bill containing an allegation that 'by divers deeds and mesne conveyances from the said Zechariah Chaffee, purporting to convey said lands by virtue and authority of the aforesaid deed to him, and from his grantees and others who derived their titles to said lands and parts thereof either mediately or immediately from said Chaffee, title to the aforesaid lands has come to these respondents,' sufficiently alleges the respondent's ownership of the land out of which dower is claimed.

"14. Whether a bill in equity for the assignment of dower which seeks to have dower set off in any less than all the lands of which the widow is dowable, can be maintained under section 15 of chapter 329 of the General Laws or under the general equity jurisdiction of the court.

"15. Is a widow entitled to have dower set off to her out of certain lands that have been conveyed to others by her husband in his lifetime, if her husband at the time of his decease was seized and possessed of other lands out of which her dower might be assigned?

"16. Can a widow seeking to have dower set off to her out of certain property in a bill in equity, brought under the general equity jurisdiction of the court or under section 15 of chapter 329 of the General Laws, join divers respondents to the number of over eight hundred if they are owners in severalty of different parcels of said property where it does not appear in said bill that all persons owning the lands out of which dower is assignable are made parties respondent?

"17. Is a bill in equity multifarious where respondents to the number of eight hundred are made parties when it does not appear that they have a common interest in all the lands out of which dower is sought?

"18. When a widow is entitled to dower in several parcels of land owned by different persons and she brings a suit in equity against the owners of said several parcels of land, is the bill multifarious because of the great number of such owners who are joined as the parties respondent in the bill?

"19. Whether a bill in equity which seeks to have dower set off in a special manner, and not in one parcel, or in contiguous parcels, by metes and bounds, can be maintained under section 15 chapter 329 of the General Laws.

"20. Can such a bill as that described in the last question be maintained under the general equity jurisdiction of the court?

"21. Where a widow by a bill in equity seeks to have dower set off to her out of several tracts of land, should the bill show who are the owners at the time of the filing thereof of each of the several tracts of land described therein?

"22. Can a widow seeking to have dower set off to her out of certain property through a bill in equity, join divers respondents who are interested in divers parcels of property out of which she seeks to have dower set off to her, without stating in the bill in equity that the property referred to in said bill in equity out of which she seeks to have dower set off to her, is all the property in which she is entitled to dower?

"23. Can a widow seeking to have dower set off to her out of certain property in a bill in equity brought under the general

equity jurisdiction of the court or under section 15 of chapter 329 of the General Laws, join divers respondents to the number of over eight hundred if they are owners in severalty of different parcels of said property where it does not appear in said bill that all the persons owning the lands out of which dower is sought are parties respondent?"

- (1) The first question must be answered in the affirmative. Under the provisions of Article XII of Amendments to the constitution of the state, Section 1. "The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity. It shall have power to issue prerogative writs, and shall also have such other jurisdiction as may, from time to time, be prescribed by law. A majority of its judges shall always be necessary to constitute a quorum. The inferior courts shall have such jurisdiction as may, from time to time, be prescribed by law," and by the fifth section of the same article, "The general assembly shall provide by law for carrying this amendment into effect, and until such provision shall be made, the supreme court as organized at the time of the adoption of this amendment, shall continue to have and exercise the same powers and jurisdictions which it shall then have under such organization." At the January Session, 1905 (on the third day of May), the general assembly enacted the Court and Practice Act, entitled: "An act revising the judicial system of the state to conform to Article XII of Amendments to the Constitution," wherein the following provision was made *inter alia*: "Sec. 9. The Superior Court shall have exclusive original jurisdiction, except as otherwise provided by law, of suits and proceedings in equity, and of statutory proceedings following the course of equity, of petitions for divorce, separate maintenance, alimony, and custody of children." Sec. 1162 of the same act made further provision, as follows: "Section 20 of Chapter 264 of the General Laws is hereby amended so as to read as follows: 'Sec. 20. Whenever the lands, tenements or hereditaments in which dower is claimed are situate in two or more counties in the state, the suit for dower, whether at law or in equity, may be brought in either county where any

of the lands, tenements or hereditaments are situate.'" The amendment was effected by striking out the following proviso from the section; "Provided that suits for dower in equity, relating to lands, tenements and hereditaments in Kent and Bristol counties, shall be brought in the appellate division of the supreme court in Providence." The original predecessor of said section 20 is sec. 1 of cap. 503 of the Pub. Laws, passed March 25, 1864, entitled: "An act in amendment of title XXIX., chapter 202, of the Revised Statutes, 'Of Dower, the action of Dower, and of Jointure,'" and reads as follows: "Section 1. When the lands, tenements or hereditaments in which dower is claimed, are situate in two or more counties in this state, the suit for dower, whether at law or in equity, may be brought in either county where any of the lands, tenements or hereditaments are situate." This statute had relation to the venue of suits and did not attempt to create any new rights of action in law or in equity. It recognized as already existing the right of widows to bring legal and equitable suits for dower. For nearly half a century it has continued to be a component part of the statutes concerning dower and is now contained in Gen. Laws, 1909, cap. 329, § 19. It is not contended that courts of equity are without jurisdiction in cases of dower, and the matter is too well settled at the present time to admit of argument. See 2 Scribner on Dower, cap. VII, §§ 10 to 15, inclusive; Cyc. Vol. 14, p. 978. 2. Forms of Remedy, and 979 f. and cases cited.

- (2) The second, third and fourth questions relative to demand for assignment of dower must be answered in the negative. "At common law both in England and in this country a demand of dower is not necessary to the maintenance of an action for its recovery, although the failure to make such demand prevents recovery of damages for the detention of dower, upon a plea of *tout temps prist*. The rule, however, that demand is not necessary has been modified by statute in some jurisdictions, so that a demand of a tenant of the freehold is a condition precedent to the maintenance of an action against him." Cyc. Vol. 14, p. 977.

As pointed out by Mr. Scribner: "In some of the states statutes have been enacted making a demand of dower an essential prerequisite to the right to proceed by action for its recovery. The Massachusetts' statute of 1641 appears to have required this, and later enactments have fully established the rule in that state. Nor can any action be brought until the expiration of one month from the time of demand. In New Hampshire, Rhode Island, and Maine, the rule is the same. In Connecticut sixty days must elapse from the time of the demand." 2 Scribner on Dower, p. 109. The Rhode Island statute therein referred to by the learned author is Revised Stats. (1857) cap. 202, § 7, whose provisions are identical with those of Gen. Laws, 1909, cap. 329, § 7, which reads as follows: "Sec. 7. If after one month's demand, made by the widow, of the persons empowered to set off dower, the same shall not be set off to her in all the lands, tenements and hereditaments in which they are empowered to set off the same, or the dower assigned and set off shall be less in value than the widow is entitled to, or shall be assigned and set off in a manner inconsistent with the provisions and true intent of this chapter, such widow may sue for and recover her dower and damages for the detention of the same by writ of dower, to be brought either against the tenant in possession or the tenant or tenants of the estate of freehold subsisting at the time of the demand."

"Demand of dower must first be made of such tenant (for years in possession) in pursuance of the statute in order to maintain the writ, and damages for detention are recoverable only from the time of demand." *Ellis v. Ellis*, 4 R. I. 110 (1856).

The statute referred to in that case is contained in the Digest of 1844 and is entitled: "An act relating to Dower and the assignment thereof," whereof section 5 reads as follows: "If any person empowered according to the third section of this act, shall neglect for one month after demand made to assign and set off to any widow her dower in all the land, tenements and hereditaments in his possession, of which she is dowable, or shall assign and set off less in value than the widow is entitled

to or in a manner not consistent with the provisions and true intent of this act, in either of these cases, such widow may sue for and recover her dower by writ of dower, to be brought against the tenant in possession or the tenant of the next immediate estate of freehold." A similar provision was contained in the Digest of 1798, p. 245, § 4. For over a century it has been the settled policy of the state, as evidenced by the foregoing statutes, to require a widow to make demand for her dower before bringing writ of dower to recover the same.

- (3) The common law has therefore been modified in this respect. As these statutes are in derogation of common law right they must receive strict and literal rather than large and liberal construction, and should not be held to embrace anything not included within the terms of their provisions. They relate solely to proceedings by writ of dower and were evidently designed for the purpose of fixing the period from which damages should be recoverable in case of detention. Hence they furnish the exclusive remedy for such detention and the recovery of damages therefor. In this connection it may be noted that although dower may be assigned by courts of probate under the provisions of Gen. Laws, 1909, cap. 329, §§ 21, 22 and 23, it is specially provided by section 24 thereof that: "No damages for detention of dower shall be allowed on such application, . . ." Moreover, as we have observed, for nearly half a century the general assembly has from time to time enacted statutes wherein the equitable suit for dower was recognized as an existing remedy without attempting to amend or extend the scope of the statute relating to demand for assignment of dower so that the same might include suits for dower in equity.

For these reasons we are of the opinion that allegation and proof of demand is unnecessary in equitable suits for the recovery of dower.

- (4) The fifth question must be answered in the affirmative. "Dower has been defined as that portion of lands or tenements which the wife hath for the term of her life of the lands or tenements of her husband after his decease, for the sustenance of herself and the nurture and education of her children. It

consists at common law of a third part of all the lands and tenements of which the husband was seized in fee simple or fee tail at any time during the coverture, and of which any issue which she might have had might by possibility have been heir, held by the wife for the term of her natural life." Cyc. Vol. 14, p. 880. "Different writers upon the subject have adopted different orders of arrangement in treating of estates. But as seemingly the most natural one, it is proposed to consider first, that out of which the others are derived or carved, and then to treat of these in their order of importance as measured by quantity or duration. Adopting this order, the first of these is an estate in *fee simple*.

"Fee, as is originally used, signified land holden of some one as distinguished from allodial lands, fee and feud being synonymous terms. But now it is ordinarily used to denote the *quantity of estate in land*, and is confined to estates of inheritance, or those which may descend to heirs. So that fee may be considered as in itself implying an inheritance. When the term *simple* is applied, it means no more than *fee* when standing by itself, as understood in respect to modern estates. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, to distinguish it from a fee tail, which, though an inheritable one, will descend only to certain classes of heirs, as well as from an estate which, though inheritable, is subject to condition or collateral determination. A fee-simple, therefore, is the largest possible estate which a man can have in lands, being an absolute estate in perpetuity. It is where lands are given to a man and to his heirs, absolutely without any end or limitation put to the estate. And a fee-simple absolute simply means a 'fee-simple.' The word 'absolute' adds nothing to its meaning or effect. It gives him the fullest power of disposing of the estate, and, if he fails to do this, it descends to such of his kindred however remote, as the law marks out as his heir." 1 Wash. Real Prop. 3d Ed. *p. 51.

- (5) The sixth question must be answered in the affirmative. In a bill in equity for the assignment of her dower, brought by a widow, it is essential that she should allege therein that her

husband in his lifetime and during their intermarriage was seised and possessed of an estate of inheritance in the lands out of which she seeks to be endowed. And this requirement is fulfilled by an allegation that he was within such time seised and possessed of the lands in fee-simple.

- (6) The seventh question must be answered in the negative. It is not a violent presumption to assume that the respondents are severally acquainted with the various links in their own chain of title. In these days of title examiners and title guaranty companies, a prudent man would hardly think of making improvements upon land conveyed to him until his title thereto had been examined and a certificate of the result of such examination obtained. The bill is brought for the purpose of obtaining an assignment of dower out of lands now held by the respondents. If the description in the bill is sufficient for the purposes of identification of the original tracts of land therein referred to, that is all that can be required. The respondents are in a more favorable position for becoming acquainted with the various ramifications and transformations undergone by the various tracts of land severally held by them since the time of the conveyance thereof by the husband of the petitioner than the widow who has been no party to any of the transactions. The case is not the same as if the information contained in the bill concerning the land in question was being given to strangers to the title for the purpose of enabling them to identify the land therein referred to. For the same reasons the eighth question must be answered in the affirmative. All that it is necessary for the widow to show is that during her coverture the husband was seized of an estate of inheritance in certain lands which lands were conveyed by him and in which she has not relinquished her right of dower. This will not ordinarily require her to set forth more than the description of the land contained in the deeds by which they were acquired and alienated.
- (7) The ninth question must be answered in the negative. "It is not indispensable that a bill for dower should negative every fact which may possibly exist inconsistent with the claim.

Allegations that complainant was the wife of one who was seized of the land; his death; his alienation of the land during the coverture, and of possession with claim of title by the defendant, are *prima facie* sufficient to entitle the complainant to a decree." 2 Scribner on Dower, p. 157. It is not to be presumed that the widow of a testator who had made ample provision for her in lieu of dower in his last will and testament, which provision had been accepted by her, would have the effrontery to abuse the process of the court for the purpose of obtaining something to which she was not entitled, having surrendered her rights in the premises for a valuable consideration. Nevertheless, if it should be made to appear that such was the fact it would constitute a sufficient defense to the claim of the widow. It is however, a matter of defense.

The tenth question must also be answered in the negative, such an allegation is unnecessary because the matter therein referred to is properly a matter of defense and may be shown as either a partial or complete bar to the widow's claim of dower.

- (8) The eleventh question must be answered in the negative. It is necessary that the owners of all the land in which she claims to be dowable should be joined under the provisions of Gen. Laws, 1909, cap. 329, § 15.
- (9) The twelfth question must be answered in the affirmative. It is unnecessary and useless to attempt to give the respondents information concerning their own title or interest in the property. They may well be supposed to have better sources of information than the complainant.
- (10) The thirteenth question must also be answered in the affirmative, because a general allegation of ownership and source of title is sufficient to apprise the respondents of the complainant's claim in that particular, and is enough to put them upon their defense.
- (11) The fourteenth question so far as the same relates to Gen. Laws, 1909, cap. 329, § 15, must be answered in the negative. A bill in equity for the assignment of dower which seeks to have dower set off in any less than all the lands of which the widow is dowable at the time of the bringing of the suit in equity cannot

be maintained under said section 15. So far as the question relates to the general equity jurisdiction of the court, the question is answered in the affirmative, for separate suits could be brought to have dower assigned out of each several parcel of land.

- (12) The fifteenth question must be answered in the negative.
- (13) The sixteenth question must be answered in the negative. The bill is brought under Gen. Laws, 1909, cap. 329, § 15, which is the exclusive remedy provided for the purpose of obtaining an assignment of dower in several parcels of land in one suit and under its provisions must be brought against all persons owning the land out of which dower is sought. We do not mean by this that it is necessary to include in the suit all the land out of which the widow was originally entitled to be endowed. It may well have happened that before this suit was brought, some of the owners of the land did set off the widow's dower therein, or agreed with her upon some substantial equivalent in lieu thereof. In such a case there would be no necessity for the widow to include those, with whom settlements had been made, as parties respondent in her bill. "If dower has been already assigned out of the land in question, and accepted by the widow, this constitutes a defence to the action and may be plead in bar. It is not necessary to set forth an assignment by deed or even in writing; an assignment *in pais* being sufficient, notwithstanding the Statute of Frauds." 2 Scribner on Dower, 136.
- (14) The seventeenth question must be answered in the negative. A bill in equity may be brought under Gen. Laws, 1909, cap. 329, § 15, against any number of respondents, irrespective of their community of interest in the lands out of which dower is sought. For the same reason the eighteenth question must be answered in the negative.
- (15) The nineteenth question must be answered in the affirmative. Gen. Laws, 1909, cap. 329, §§ 2 and 17 recognize the fact that peculiar conditions may exist wherein it will be just and equitable to set out dower in an extraordinary manner and the provisions of section 17 are applicable to "all actions at

law, or suits in equity," and are therefore broad enough to include a suit in equity under section 15 of the chapter.

The twentieth question, so far as it relates to an ordinary bill in equity for the assignment of dower, must also and for the reasons given in the next preceding answer be answered in the affirmative.

- (16) The twenty-first question must be answered in the negative. If the bill shows who are the owners of all the tracts of land described therein it need not show who are the owners of each of said tracts. In other words, it is easier for each respondent to ascertain the location of his own land in the premises described in the bill than for the complainant to attempt to do so.

For the reasons given in the answer to the sixteenth question the twenty-second question must be answered in the negative.

The twenty-third question must also, and for the same reason, be answered in the negative.

Having thus answered the questions certified to us, the papers in the cause, with our decision certified thereon, are remitted to the Superior Court for further proceedings.

Walter R. Stiness, John H. Slattery, Nathan W. Littlefield, for complainant.

Gardner, Pirce & Thornley, for respondent, WILLIAM R. RANDALL; *Waterman, Curran & Hunt*, for respondent, FREDERICK E. PERKINS; *Albert A. Baker, Page & Cushing, E. K. Parker, James C. Collins, Edwards & Angell, Terence M. O'Reilly, Benjamin L. Dennis, Everett L. Walling, Benjamin W. Grim, Clarence A. Aldrich, Charles E. Salisbury, Henry C. Cram, Thomas F. West, Richard W. Jennings, Edwin C. Pierce, Green, Hinckley & Allen, Harry C. Curtis, A. A. Capotosto, Thomas Riley, Jr., Peter M. O'Reilly, A. S. & A. P. Johnson, Edward M. Sullivan, Howard T. Metcalf, Charles R. Easton, George A. Breaden, William C. H. Brand, Patrick P. Curran, Joseph C. Cawley, Thomas P. Corcoran, Gonzalo E. Buxton, Jr., John P. Beagan*, for various respondents.

STATE vs. JOSEPH BADNELLEY.

MAY 29, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Criminal Law. New Trial.*

The general rule laid down in *Wilcox v. R. I. Co.*, 29 R. I. 292, that the verdict of a jury when approved by the justice who presided at the trial, will be sustained by the court, in the absence of anything to indicate that the jury were improperly influenced or that the judge erred in his ruling, can properly be applied also in criminal cases and for the same reasons.

(2) *Rape. Evidence. Hearsay Rule. Res Gestae.*

A statement of the prosecutrix made on the street about half past three o'clock, about an hour after the assault was alleged to have occurred in the house, is admissible as a part of the *res gestae*, where it appears that she had made previous complaints to members of the household as they arrived soon after the commission of the offence and also accused defendant to his face when he arrived after being sent for, her conduct appearing perfectly consistent in her complaints and accusal.

(3) *Evidence.*

Where a witness had testified that the prosecutrix had made a complaint to him as chief of police, "Q. Against whom?"—exception—A. (defendant).

Q. "And in consequence of the complaint did you issue the complaint in this case? A. I did."

Held, that defendant was not prejudiced.

CRIMINAL COMPLAINT. Heard on exceptions of defendant and overruled.

DUBOIS, C. J. This is an indictment for an assault with intent to commit rape, tried in the Superior Court within and for the county of Newport. In the course of the trial the defendant took exception to certain rulings of the court and after verdict of guilty filed his motion for a new trial which was denied by the court and thereupon the defendant also took an exception to this action of the court. The case came to this court upon the defendant's bill of exceptions whereof the defendant now relies upon the following:

"Second: That the justice presiding erred in his refusal to

grant the defendant's motion for a new trial, which said motion was based upon the following grounds, namely:

1st. That the verdict of the jury was against the evidence.

2nd. That the verdict of the jury was against the law."

"Fourth: That during the trial of said indictment the Assistant Attorney General asked Jacob Eisinger the following question: 'Q. 32. Did your wife tell you then what had occurred between her and Joseph Badnelley?' To which question the defendant objected and his objection being overruled, exception was duly taken and said question was answered.

"Fifth: That during the trial of said indictment the Assistant Attorney General asked Jacob Eisinger the following question: 'What did your wife tell you about this affair?' To which question the defendant objected and his objection being overruled, exception was duly taken and said question was answered.

"Sixth: That during the trial of said indictment the Assistant Attorney General asked James R. Crowley, Chief of Police, the following question: 'Q. 12. Against whom?' To which question the defendant objected and his objection being overruled, exception was duly taken and said question was answered.

"Seventh: That during the trial of said indictment the attorney for the defendant asked Martha Schreir the following question: 'Did you then tell her that there were only three in the family?' To which question the Assistant Attorney General objected, his objection was sustained and the witness was not allowed to answer and exception was duly taken."

"Ninth: That the defendant requested the Justice presiding to charge as follows: 'Before you will be warranted in finding this defendant guilty of this offence, you should weigh and scrutinize the testimony of the complainant very carefully in order that the presumption of innocence which obtains in favor of the accused shall be fully and clearly overcome.' Which request was denied and exception duly taken."

The first of the foregoing exceptions involves a consideration

of whether the verdict was against the law and the evidence. Nothing has been suggested to us either in the briefs or in the argument that might be of assistance in determining in what particular, if any, the jury disregarded the law laid down by the trial court for their guidance, nor have we been able to discover that they erred in that respect. Therefore the verdict cannot be held to be invalid for that reason.

There was evidence tending to support the charge against the defendant, evidence of inclination and opportunity, of early complaint by the prosecutrix, corroborative evidence of physical objective symptoms, condition of clothing, etc. The defence was an *alibi*. The evidence was conflicting and therefore it was the duty of the jury to pass upon the veracity of the various witnesses and the credibility of the testimony given by them. In the absence of any evidence to the contrary it is to be presumed that they faithfully performed that duty. They were in a position and condition suitable for its performance. Their attention was undoubtedly attracted by the gravity of the occasion and their senses were stimulated by the desire to ascertain the truth in a case involving a grave charge against one of their own sex. In the consideration of the matter they undoubtedly did endeavor to discover what motive an apparently respectable woman could have for making such a charge, if untrue. In the circumstances of this case the behavior and appearance of the witnesses upon the stand and in the court room under the observation of the jury was of necessity of great value to them in the determination of the case. A careful examination of the transcript does not reveal any error upon the part of the jury. But not only have the jury found the defendant guilty beyond a reasonable doubt, but the trial justice, who also saw and observed the witnesses, has approved (1) of the verdict and thereby added the weight of his approval to the finding of the jury. A verdict so approved will not be disturbed save for the best of reasons. The rule applicable in civil cases can properly be applied also in criminal cases and for the same reasons. See *Wilcox v. The Rhode Island Company*, 29 R. I. 292.

The fourth and fifth exceptions relate to the following questions propounded to Jacob Eisenger, husband of the prosecutrix: "Q. 32. Did your wife tell you then what had occurred between her and Joseph Badnelley?" The question itself is unobjectionable because it calls for a categorical answer in the affirmative or negative, as the case may be, but was afterwards changed at the suggestion of the court to "What did your wife tell you about this affair?" The answer given as finally translated by the interpreter was: "First she could not talk; then she told me that he attempted to commit a rape on her." This court has held that "What the prosecutrix said to a person in the house about the affair immediately after its occurrence, was clearly a part of the *res gestae*." *State v. Fitzsimon*, 18 R. I. 236, 241, citing *State v. Murphy*, 16 R. I. 528; *McCombs v. The State*, 8 Ohio St., 643; *Rex v. Clarke*, 2 Starkie, 241; *The State v. Patrick*, 107 Mo. 147, 163, 168.

- (2) In *State v. Murphy*, *supra*, this court said (p. 530)—"The admissibility of this kind of testimony has been much discussed, but it is now settled beyond question that, to some extent at least, statements immediately following and connected with a transaction, which otherwise would be mere hearsay, are admissible as a part of the transaction itself. The principle upon which the admission of such evidence rests is, that declarations after an act may, nevertheless, spring so naturally and involuntarily from the thing done as to reveal its character, and thus belong to it and be a part of it; also to rebut all inference of calculation in making the declarations, and thus to entitle them to credit and weight as evidence of the transaction itself. So numerous have been the adjudications upon this point that the difficulty does not now lie in ascertaining whether testimony of this kind is admissible, but in determining to what extent and under what circumstances it is admissible."

It is true that the complaint in question was made on the street about half past three o'clock and that the assault complained of occurred in the house about an hour before, but the prosecutrix had made complaint in the house to members of

the household as they arrived soon after the commission of the offence and accused the defendant to his face when he arrived after having been sent for. Her conduct appears to have been perfectly consistent in her complaints and accusal and the complaint in question may well be regarded as a part of the *res gestae*. The defendant therefore takes nothing by these exceptions.

- (3) The sixth exception relates to the following question to the Chief of Police: "Q. 12. Against whom?" The context shows that the witness had testified that Clara Eisinger, the prosecutrix, made a complaint to him. The answer to the question was: "Joseph Badnelley." "Q. 13. And in consequence of that, of the complaint, did you issue the complaint in this case? A. I did." We fail to see how the defendant was prejudiced thereby.

The seventh exception relates to the ruling out of the following question asked in examination of Martha Schreir, a witness for the defendant. "Did you then tell her that there were only three in the family?" The witness was mother-in-law of the defendant and had testified that she had employed the prosecutrix to work as a housemaid. In the cross-examination of the prosecutrix she was asked by the counsel for the defendant, as follows: "C. Q. 273—Was Mr. Schreir and Mrs. Schreir there when you made your arrangements about employment? A. Yes; also another girl in the store, too, and another girl who fixed hats. C. Q. 274. Was the man from the Employment Agency there also? A. Yes, he was also there. C. Q. 275. And did he hear the arrangements that you made there, that you were making for your employment? MR. CROSS—I don't know how all this is material. MR. NOLAN: It is important as showing whether two or three were employed there. MR. CROSS—That is of no consequence. MR. NOLAN: If you will permit me to inquire. It is of some consequence. BY THE COURT—If you claim that is material to your case I will allow the question to be asked. C. Q. 276 (BY MR. NOLAN) Was this man from the Employment Agency present when you made your arrangements with Mr. or Mrs. Schreir? A. Yes;

he heard everything, and at the conclusion he asked me if I want to stay, whether I want to stay, whether I will accept the position. He wanted to show me other places, bring me to other places. C. Q. 277. And he heard Mrs. Schreir tell you that all the people you would have to work for would be three people? A. Yes, she has told me,—I my husband, an old mother I had, and my daughter is there to visit only a few days." The court properly excluded the question and there is no validity in the exception.

The ninth, and last exception, relates to the refusal of the court to charge the jury as requested. The court had sufficiently instructed the jury in this behalf and the defendant was not entitled to a repetition of the charge in these particular terms.

The defendant's exceptions are therefore overruled and the case is remitted to the Superior Court in the county of Newport for sentence.

William B. Greenough, Attorney-General, Harry P. Cross, Second Assistant Attorney-General, for the State.

Burdick & McLeod, Frank F. Nolan, for defendant.

FENNER A. IRONS vs. NATHANAEL R. GREENE.

MAY 29, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Master and Servant. Due Care. Contributory Negligence in Law.*

A machinist accustomed to the workings of machines though claiming he was not acquainted with windmills, sent aloft sixty feet to ascertain and remedy a defect in the operation of the windmill, with a wind blowing and the mechanism in motion, realising the necessity of first lashing the wheel and having the means at hand for lashing it, is bound to a degree of care commensurate with the dangers to which he was exposed and his admission that he knew the piston rod would work if the mill was not lashed is evidence of such contributory negligence in not fastening it as suffices in law to bar recovery.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and sustained.

BLODGETT, J. At the conclusion of the trial of this action on the case for negligence the defendant moved for the direction of a verdict which was denied, and to such denial the defendant duly excepted, and after verdict for the plaintiff the cause is brought here on defendant's exception to such denial.

The evidence disclosed that the plaintiff was a machinist by calling and that he was employed by the defendant to attend to various matters connected with the defendant's hotel, among those specified in the defendant's letter specifying his duties being to "attend to the windmill and see that the water supply is all right and the ice plant in order and attend to the gas plant when necessary." The plaintiff was injured while repairing the windmill above referred to, which stood about sixty feet above the ground and had been damaged in some way by a high wind so that its action could not be controlled from the ground. The plaintiff was instructed to ascertain the cause of the trouble and to repair it. He ascended the post which supported the windmill, in which there were spikes driven at intervals on the sides thereof, until he reached the platform directly beneath the wheel, which extended like a floor on the frame work of the mill, but having a "V" shaped opening on one side to admit one to ascend and to descend therefrom in case of needed repair. The wheel was in motion by the wind then blowing, and this is his testimony: (p. 25) "Q. 164. Then at the time you went to Greene's Inn to inquire about this job, you knew that a part of your duties and the most they wanted was to take care of and attend to a windmill, didn't you? A. Yes." (p. 26) "Q. 174. You are a machinist by trade? A. Yes. Q. 175. And know something about machines, don't you? A. Yes. Q. 176. And the workings of them? A. Yes." (p. 29) "Q. 203. Now when Mrs. Greene—you had some conversation with Mrs. Greene in the office just prior to your fixing the mill? A. Yes. Q. 204. And what was that? A. She told me that I ought to fix it right off as it was liable to blow away." (p. 33) "Q. Now you say that you took up the plyers and a hammer, a wire and a rope? A. Yes. Q. What did you take the rope for? A. To tie the windmill. Q. To tie the wind-

mill? A. Yes. Q. Who told you to take it? A. I took it myself. Q. Nobody told you to take it? A. Nobody. Q. Did you think it was necessary to lash that mill before you went to work on it? A. I had never gone up there; if it wasn't—Q. You knew it was necessary? A. Anybody would know it, if the wind changes the windmill will swing. A. And you knew that if you didn't lash that mill that that piston rod would run up and down, would work? A. Yes. Q. And if you did lash it, it wouldn't work? A. Well, if the mill was shut off it wouldn't. Q. If you lashed it tight enough the piston rod wouldn't work, would it? A. No." (p. 41) "Q. When you tied it would it work any? The mill operating just the same? A. The wheel was working. Q. Do you mean to say that you tied that mill and it still kept working? A. I tied the mill so that it wouldn't swing around, I didn't tie it so that it would stop working." His claim is that, in attempting to descend through the "V" shaped opening in order to procure additional tools, as he stooped to place his right foot on the first spike below the said opening he leaned upon a piece of board about four and one-half inches wide, seven-eighths inches thick and situated three feet six inches from the post to its outer edge, and that as he felt it giving way at one end, he threw one hand around the post supporting the wheel, between the pump-rod or piston and the post, and that a joint or coupling on said rod in its downward stroke crushed his hand and caused the injury of which he complains. He did not fall from the platform but descended in safely otherwise than as above described.

It is evident that his injury was caused by the motion of the pump-rod, as he himself claims, and that if said rod had been stationary he would not have been hurt.

- (1) A machinist accustomed to the working of machines, though claiming he was not acquainted with windmills, sent aloft to a height of sixty feet to ascertain and remedy a defect in its operation and control, with a wind blowing and the whole mechanism in motion, and at two o'clock in the afternoon of a June day, and realizing the necessity of first lashing the wheel, as well as having the means at hand for securely lashing the

same, must be held subject to the rule laid down in *Judge v. Narragansett Electric Lighting Co.*, 21 R. I. 128, viz.: "In these circumstances he was bound to the exercise of a very high, if not the highest, degree of care, or, in other words, to a degree of care commensurate with the dangers to which he was exposed." His admission that he knew that the piston rod would run up and down if the mill was not properly lashed is evidence under the circumstances of this case of such contributory negligence in not fastening it, as suffices in law to preclude his recovery.

The defendant's exception is sustained and the plaintiff may show cause on June 5, 1911, at ten o'clock, A. M., why judgment should not be entered for the defendant.

T. P. Corcoran, for plaintiff.

Frederick C. Olney, for defendant.

In re SUSPENSION OF MAXIMILLIAN L. LIZOTTE.

MAY 31, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Suspension of Attorney from Practice.*

After the suspension of an attorney from practice for a fixed term, he conducted himself in respect to the practice of his profession in the same manner as he did before the entry of such decree except that he did not appear before the courts and did not in his own name cause the process of the court to issue;

Respondent being adjudged in contempt is ordered to refrain from holding himself out in any manner as an attorney; from undertaking any legal service of a nature usually performed by members of the bar; from using his sign as an attorney upon his office, or stationery whereon his name appears as an attorney, and is suspended from practice for a further term.

COMPLAINT against a member of the bar. Heard on motion to show cause why respondent should not be adjudged in contempt of decree of suspension.

SWEETLAND, J. On the 9th day of July, 1910, the respondent was suspended from the practice of his profession, as an attor-

ney and counsellor at law, until the 10th day of July, 1911. By a communication from the committee on complaints against Members of the Bar it has been brought to the attention of the court that the respondent is holding himself out to the public as one at present qualified to act as an attorney at law. The respondent was cited to appear before this court to show cause why he should not be adjudged in contempt of said decree entered July 9, 1910. At a hearing upon said matter it appeared that the respondent after the decree of suspension retained the sign upon his office door reading "M. L. Lizotte, Attorney at Law, Notary Public, Entrance;" that in November, 1910, he moved his office to another room in the same building and placed the said sign upon the door of his new office where he had retained it up to the time of said hearing; that for several weeks after said removal he maintained a notice posted upon the wall of the corridor beside the door of his former office reading, "Law Office of M. L. Lizotte removed to Room 706;" that since the time of his suspension he has permitted and encouraged persons to consult with him in his office upon their legal business and in regard to litigation; that he has advised these clients in the same manner as before his suspension; that he has collected claims; that in the prosecution of such collections and in the course of all these matters he has used and sent through the mails stationery and envelopes bearing the same printed heading as that used by him before his suspension, in which heading he is styled as an attorney at law; that, when in the course of these matters he has deemed it necessary to have writs or other legal process issue, he has taken his clients to attorneys occupying neighboring offices and turned such matters over to said attorneys, with the purpose, as it clearly appears, that such proceedings in court should be kept alive

(1) until the end of the term of his suspension. From the testimony given at the hearing the court finds that the respondent since July 9, 1910, has conducted himself in respect to the practice of his profession in the same manner as he did before the entry of said decree, except that he has not appeared before

the courts as an attorney and that he has not, in his own name, caused the processes of the court to issue.

It has been urged as an excuse for this conduct of the respondent that the things which he is charged with doing in violation of said decree he might well do if he was not a member of the bar; that persons not members of the bar collect claims, give advice upon legal matters, draw deeds and other legal documents, search and certify titles and solicit legal business which they turn over to attorneys when proceedings in court become necessary.

The purpose of this court is not to be nullified by an approval of such reasoning. It will not permit its disciplinary orders to be evaded nor will it allow its officer to publicly disregard its decree by such a subterfuge. The matters above enumerated are regular, legitimate and recognized parts of a lawyer's profession and in such matters the public seeks the service of the lawyer because his professional training qualifies him for their proper and trustworthy performance. While it is true that persons who are not of the legal profession at times assume to do the things which this respondent has done since his suspension, they do not and they would not be permitted to so act in the guise of attorneys at law. Members of the bar who are under suspension will be required to comply with the terms of the decree suspending them in such a manner that there may be no ground for suspicion on the part of other members of the bar or of the public that the decrees of this court are not being exactly observed in their letter and their spirit. A failure to so act will be a cause for further punishment.

In dealing with this respondent we shall take into consideration that before entering upon the course of conduct which he has pursued since the entry of said decree he consulted with two other members of the bar and apparently in some particulars his conduct met with their approval. We shall give to the respondent the full benefit of this circumstance in its bearing upon the question of the wilfulness and recklessness of his conduct. Such a view, however, of the respondent's situation appears to this court to be entirely unwarranted and indicates

a lax notion of the purpose and extent of the punishment of suspension, which should be clearly and vigorously corrected, that no one hereafter may be led to disregard a similar decree, and while ignoring the spirit of its provisions hope to escape liability by a compliance with what he may be pleased to consider its literal requirements.

We adjudge the respondent in contempt of said decree entered July 9th, 1910.

It is ordered that the respondent shall at once, and throughout the remainder of the period of his suspension discontinue his sign as an attorney at law upon his office, and shall cease to use any stationery whereon his name appears as an attorney at law; that he shall not undertake any legal service of a nature usually performed by members of the bar and that he shall most carefully refrain from holding himself out to the public in any manner as an attorney at law; and further, that he shall continue to be suspended from the practice of his profession until the 10th day of October, 1911.

Fitzgerald & Higgins, John S. Murdock, for respondent.

FANNY EISENBERG vs. MATTHEW J. GALLAGHER, *et al.*

JUNE 2, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Mortgage Sale. Notice.*

A mortgage requiring twenty days notice of sale by advertisement, the first publication was on February 28; and the remaining on March 6, 13, and 20, in a paper published weekly, the sale to be held on March 24.

On February 28, the mortgage was owned by A. On March 3, A. assigned the mortgage to respondent B., the other respondent C. acting as broker for B.

B. testified that he had no knowledge of the advertising and had given no instruction to foreclose.

Held, that B. could not order a sale under a mortgage which he did not own, and even if it were not clear that C. assumed to act for B. in the matter of the sale after March 3, when B. became the owner of the mortgage, the notice was not published the required time thereafter and hence the sale was invalid.

BILL IN EQUITY to set aside mortgagee's sale. Heard on appeal of respondents from decree of Superior Court and decree affirmed.

BLODGETT, J. This is a bill in equity brought to set aside a mortgagee's sale of real estate described in the bill of complaint, and also to clear the complainant's title thereto of the cloud cast thereon by a mortgagee's deed of said realty to one of the respondents by the other, and to enable the complainant to redeem her property from the mortgagee's control. The Superior Court held that the complainant was entitled to relief as prayed, a decree to that effect was entered, and within due time the respondents appealed from that decree and are now here on that appeal.

The complainant contends that the sale under the power contained in the mortgage was invalid for failure to comply with the conditions relative thereto requiring twenty days' notice thereof by advertisement. It is conceded that the first publication of the notice of sale was made on February 28, 1908, and that the remaining publications appeared on March 6, 13 and 20, 1908, in a paper published weekly, the sale to be held on March 24, 1908. On February 28, 1908, the mortgage was owned and held by one Hinckley to whom it had been previously assigned. It is also undisputed that on March 3, 1908, Hinckley assigned said mortgage to the respondent Whipple, the other respondent Gallagher acting as broker for Whipple in this transaction. Whipple testified as follows: "C. Q. 107. You had no knowledge of any advertising? A. No sir. C. Q. 110. Never mind the understanding; had you given Mr. Gallagher any notice or orders to foreclose this mortgage? A. Well, that is, no written or any—C. Q. 111. Had you given him any notice, written or otherwise to foreclose the mortgage bought by you from Hinckley on the Newton property? A. Mr. Gallagher—C. Q. 112. Answer my question. A. I don't know—well, I will say no to that question. C. Q. 116. As far as you know, Mr. Whipple, March 3, 1908, was the first time that you acquired any interest in this mortgage which

is the subject of this suit? A. I suppose it was according to that. C. Q. 117. There isn't any question in your mind about that fact? A. No, of course the date is on it there. C. Q. 120. Now, between the 3rd of March, 1908 and the day of the sale, which you understand was the 24th of March, you had done nothing in the matter of this mortgage, had you, at all? A. No, no. C. Q. 125. So far as your knowledge stands, you neither wrote Mr. Gallagher nor told him anything about this Hinckley mortgage from the 3rd of March up to the 24th of that same month, is that right? A. That is right, I guess. C. Q. 130. Now, was that in February that you had the talk with Mr. Gallagher in which he told you what you have said about the Newton mortgage? A. According to the date of that transfer, I should infer that it was the last of February or the very first of March. C. Q. 131. At that time you had no interest in the Hinckley mortgage? A. No. C. Q. 132. Either directly or indirectly as far as you know? A. No." And Gallagher's testimony is as follows: "Q. 22. The advertisement was subsequent to the time? A. Yes." . . "C. Q. 101. Who did you say put the advertisement in? A. Mr. Frank Hinckley, attorney. C. Q. 102. He was acting for his father? A. Acting at that time for Whipple. C. Q. 103. Are you prepared to swear that Frank Hinckley was acting for Mr. Whipple at the time, March 3, 1908? A. Yes, on my authority."

- (1) It is perfectly clear from the uncontradicted testimony that Gallagher, who became the purchaser at the sale, not only assumed to act for Whipple in the matter of the sale, after March 3, 1908, when Whipple was the owner of the mortgage, but that he assumed to act for Whipple in giving notice of the sale on February 28, when, as Whipple admits, he had no interest in the mortgage. It is so obvious that Whipple could not order a sale under a mortgage which he did not own that it is unnecessary to cite authorities in support of the statement; and publications on March 6, 13 and 20 of a sale to be held on March 24 at most give but eighteen days' notice thereof. It follows that the sale was invalid and that the complainant is entitled to the relief she seeks.

The decree of the Superior Court is therefore affirmed, and cause remanded to the Superior Court for further proceedings.

Cooney & Cahill, for complainant.

Green, Hinckley & Allen, Fitzgerald & Higgins, for respondents.

WHITFORD, BARTLETT & CO. vs. WALTER E. TOWNSEND,
Admr.

JUNE 3, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Exceptions. Transcript of Evidence.*

An appeal from a decree of a probate court was tried by a justice of the Superior Court without a jury, and April 30, 1910, the court announced decision denying the appeal. May 2, the justice recalled the rescript and May 5, filed a second decision reversing the former decision and sustaining the appeal. Appellee excepted to this decision;

Held, that inasmuch as no transcript of evidence had been allowed, and no petition to establish the truth of the transcript had been filed in the Supreme Court, the exceptions could not be considered.

(2) *Recall of Decision of Superior Court.*

Following *Ashaway National Bank v. Superior Court*, 28 R. I. 355, the action of the court in recalling the rescript after decision was without statutory authority.

(3) *Stipulated Evidence. Agreed Statement of Facts.*

Among the papers in a cause heard by a justice of the Superior Court without a jury, on a probate appeal, was one signed by counsel of the respective parties, with the following stipulation: "It is agreed that the following statement is a true and proper statement of the testimony in said case".

Held, that if considered as a stipulation as to the evidence offered in the probate court, there was no authority giving the Superior Court jurisdiction to decide a cause upon such an instrument, and if considered as an agreed statement of facts under Gen. Laws, 1909, cap. 298, § 4, there was no authority for a decision of the cause in the Superior Court.

PROBATE APPEAL. Heard on exceptions of appellee and dismissed.

BLODGETT, J. This is an appeal from a decree of the Probate Court of the city of Pawtucket holding that a claim of Whitford,

Bartlett & Co. against the estate of one Thomas Murray was barred by the statute of limitations and was tried by a justice of the Superior Court (jury trial being waived) on April 20, 1910. The record shows that on April 30, 1910, the court announced its decision, the conclusion of which is as follows: "The appeal is denied and dismissed and the decree of the Probate Court confirmed," and notice of said decision was mailed by the clerk of said court to the counsel for the respective parties on the same day. On May 2, 1910, the justice who heard the cause in said court recalled the rescript announcing said decision and on May 5, 1910, filed with the clerk a second decision reversing the former decision and concluding as follows: "We therefore feel obliged to sustain the appeal of the appellant." The appellee duly excepted to the second decision and the case is brought here on his bill of exceptions.

The exceptions must be dismissed for several reasons.

- (1) (1) Inasmuch as no transcript of evidence has ever been allowed by the justice who heard the cause and no petition to establish the truth of the transcript has ever been filed in this court, we are unable to consider his exceptions. *Paull v. Paull*, 30 R. I. 253.
- (2) (2) The exceptions are taken to the second decision rendered on May 5, 1910. In *Ashaway National Bank v. Superior Court*, 28 R. I. 355, 359, it was stated by this court: "We find no statutory authority for the position that cases may be held for advisement after decision therein has been recorded or that cases may be redecided from time to time at the option of the court."

- Among the papers in the case we find one entitled only as follows: "Superior Court, Providence, Sc. *In Re Estate of Thomas Murray*. It is hereby agreed and stipulated that the following statement is a true and proper statement of the testimony in said case." . . . This paper purports to be signed by the counsel of record of the respective parties and appears by the filemark thereon to have been filed in the office of the clerk of the Superior Court for Providence County on April 20, 1910, but is not otherwise in any way authenticated. We are
- (3)

consequently unable to determine its effect. If it is considered as a stipulation as to the evidence offered in the Probate Court of Pawtucket, we know of no provision of law giving jurisdiction to the Superior Court to decide a cause upon such an instrument. If it is an agreed statement of facts as provided for in sec. 4, cap. 298, Gen. Laws, 1909,—the provisions of said section are as follows: "Whenever a civil action, pending in a district court or in the Superior Court, is at issue on its merits, and the parties shall file in the clerk's office an agreed statement of the facts in such action, the court shall certify the action to the Supreme Court to be there heard and determined," and we know of no statutory authority for a decision of the cause in the Superior Court.

While appellee's bill of exceptions must be dismissed, the case must be remitted to the Superior Court for further proceedings.

Bassett & Raymond, for appellant.

Hugh J. Carroll, for appellee.

PATRICK McHUGH vs. PROVIDENCE GAS CO.

JUNE 7, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Master and Servant. Negligence. Burden of Proof.*

Upon the issue as to whether defendant used a valve and pipe which were defective, which defect it knew or would have known had it used due care, the accident being the same as that before the court in *Mulvey v. Providence Gas Co.*, 30 R. I., 547, and the evidence tending to establish facts substantially similar to those in such case, the court is unable to find any negligence on the part of defendant, leaving the cause purely conjectural, and the plaintiff has failed to sustain the burden of proof.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and overruled.

BLODGETT, J. This is an action for personal injuries, tried to a jury on November 7th and 9th, 1910, in the Superior

Court and resulted in the granting of a nonsuit at the close of the plaintiff's evidence. The plaintiff is now before this court on his bill of exceptions duly allowed, in which he claims prejudicial error was committed against him by the granting of defendant's motion for a nonsuit, and by the admission and exclusion of certain evidence.

The accident forming the basis of this action is the same accident which was before this court in the case of *Mulvey v. Providence Gas Company*, 30 R. I. 547 (1910); the plaintiff is the McHugh mentioned on pages 548 and 549 in the opinion in that case, and the pleadings, with the exception of the name of the plaintiff and a slightly reduced *ad damnum* in the declaration, are identical with the pleadings before the court in that case. The plaintiff states his cause of action in two counts, both of which base his right to recover on the alleged negligence of the defendant. In the first count it is alleged that the plaintiff was injured because the defendant used in its process of manufacturing gas a certain pipe and valve which were defective, and which the defendant "knew, or but for want of reasonable care and diligence would have known," were defective. In the second count the defendant is alleged to have been negligent because it did not exercise a reasonable inspection so as to keep and maintain in safe repair its said pipe and valve. To each count the defendant filed the general issue. The issue, as framed by the pleadings, in so far as the negligence of the defendant was concerned, was therefore: "Did the defendant use a valve and pipe which were defective, which defect it knew or would have known had it used due care?"

- (1) The evidence at the trial of this case tended to establish facts substantially similar to those set forth in the opinion of the court in the *Mulvey* case. The court has examined the pipe and the cotter bar and plate in use at the time of the accident and produced as an exhibit in this case and we are unable to find now, as we were unable to find in the *Mulvey* case, any negligence on the part of the defendant; and we remain of the opinion there expressed as to the cause of the accident.

We find no error of the trial justice on the exceptions relat-

ing to the admission and rejection of evidence and are of the opinion that the nonsuit was properly granted.

Plaintiff's exceptions overruled and case remitted to the Superior Court with direction to enter judgment as of nonsuit for the defendant.

A. B. Crafts, John P. Brennan, for plaintiff.

Francis B. Keeney, Seeber Edwards, Edwards & Angell, for defendant.

FIRST NATIONAL BANK OF PAWTUCKET vs. GEORGE E. DISPEAU,
et al.

JUNE 5, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Mortgages. Foreclosure. Adverse Possession. Title of Mortgagor.*

In 1892, X. gave a mortgage to plaintiff, and in June 1894, it was foreclosed and the title purchased by plaintiff, and X. continued to live on the premises until his decease. December 19, 1899, X. brought a bill in equity claiming the mortgage was obtained by coercion, but upon trial it was held to be valid, final decree being entered December 3, 1902.

December 2, 1909, plaintiff brought trespass and ejectment against the heirs of X.

Held, that the relation of a mortgagor holding possession in subordination to the title of the mortgagee existed from 1892 to 1894, and from 1894 to December 19, 1899, the possession of X. was that of a mortgagor continuing in possession as a tenant at will or sufferance holding in subordination to the title of the mortgagee, unless it was shown to have been interrupted by distinct, positive and notorious acts on the part of the mortgagor or his successors which were brought to the attention of the mortgagee or were of such notorious a character as would ordinarily come to its attention, which was not established.

The presumption is that the possession of a mortgagor after a foreclosure is held in subordination to the title of the purchaser until a contrary intention is made manifest.

TRESPASS AND EJECTMENT. Heard on exceptions of defendants and overruled.

BLODGETT, J. This is an action of trespass and ejectment brought by the First National Bank of Pawtucket against

George E. Dispeau, Minnie J. Dispeau and Florence J. Dispeau, to recover possession of a certain piece of real estate situated in the city of Pawtucket, and is before this court on defendants' exceptions to the direction of a verdict for the plaintiff by the Superior Court. The real estate was formerly owned and occupied by the father of the defendants, one George Dispeau, for many years prior to his death. It was occupied by George Dispeau and his children at the time of his death in 1909, and has continued in the occupancy of his children, the defendants, since his death.

In 1892 George Dispeau gave a mortgage upon this property to the Bank to cover an indebtedness which was then acknowledged to be due by him to it. In June, 1894, default having been made in the conditions of this mortgage, it was foreclosed and the title purchased by the Bank, and George Dispeau continued to live on the premises with his family until his death. On December 19, 1899, a bill in equity was filed in this court against the bank (this plaintiff) by George Dispeau for an accounting between the bank and himself and also claiming that the mortgage was invalid inasmuch as it had been obtained by coercion. The case was contested before this court and in an opinion given by the court it was held that the mortgage was valid. See *Dispeau v. First National Bank of Pawtucket*, 24 R. I. 508.

This suit in equity was brought by bill of complaint filed December 19, 1899, service of subpoena was made upon the bank December 20, 1899, and final decree was entered December 3, 1902, dismissing the bill. The present action of trespass and ejectment was brought by writ issuing out of the District Court of the Tenth Judicial District December 2, 1909, which was served upon the defendants December 3, 1909,—within a period of ten years from the commencement of the equity suit. The statutory period of required adverse possession had not elapsed since the commencement of the other suit.

The relation of a mortgagor holding possession in subordination to the title of the mortgagee is thus shown to have existed from 1892 to 1894, and from 1894 to December 19, 1899, as

far as the evidence goes, the possession of George Dispeau was that of a mortgagor continuing in possession as a tenant at will or sufferance holding in subordination to the title of the mortgagee. There is no evidence in the case upon which a contrary contention can be shown, except the testimony of one Mr. Aldrich as to a protest against the foreclosure sale in 1894, as follows: "Witness: But he said in regard to the sale, he said, 'Gentlemen, if you bid on this property you can't get a clear deed and title of it.' And he says, 'I object to this sale.' MR. COLLINS: What did he say? Witness: That he objected to the sale."—It was against this right to exercise the power of sale given by himself that he protested. This power has been held to have been valid

This protest was not followed by further acts or notice after the sale tending to contradict the nature of the holding, which is presumed to have been friendly and not adverse. Moreover the testimony of William H. Park, the cashier of the bank, was as follows: "Q. 134. As cashier of the bank you were the active man there for a good many years, weren't you? A. Yes. Q. 135. For the last twenty years at least you have been the active man at the bank, haven't you? A. Mr. Arnold and myself. Q. 67. Were you present when this mortgagee's sale was made? A. I think so. Q. 77. Did you not know that during that period from the time of the mortgagee's sale under this deed down to Mr. Dispeau's death, from him, that he held that property—from him or his authorized representatives—that he held that property denying the title and right of the First National Bank? A. I never heard of such a thing."

- (1) The relation between the mortgagor and the mortgagee is that of a holding by the mortgagor in subordination to the title of the mortgagee and this relation continued after the foreclosure of the mortgage unless it is shown to have been interrupted by distinct, positive and notorious acts on the part of the mortgagor or his successors in title which have been brought to the attention of the mortgagee or are of so notorious a character as would ordinarily come to his attention.

Nothing has been shown in the testimony offered in this case which would indicate a clear, distinct and notorious holding on the part of the defendants and their ancestor hostile and adverse to the title of the plaintiff. No attempt was made on their part to pay the taxes which have annually been paid by the plaintiff and there is no evidence that they made any repairs to the premises. The Bank paid the insurance. They were simply tenants at will or sufferance, and have never made any disclaimer to change this possession.

The presumption is that the possession of the mortgagor after the foreclosure of the mortgage is held in subordination to the title of the purchaser until a contrary intention is made manifest.

In the case of *Doyle v. Mellen*, 15 R. I. 523, at 526, STINESS, J. said: "Whether we regard one who owns the equity of redemption as a tenant, or as one holding in privity with and subject to the mortgagee's right of entry, his holding is not inconsistent with the title of the purchaser at the mortgagee's sale. There is, therefore, no adverse holding, no ouster of the owner, and no disseizin, 'until the possession before consistent with the title of the real owner becomes tortious and wrongful by the disloyal acts of the tenant, which must be open and notorious, so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner.' *Zeller's Lessee v. Eckert*, 4 How. U. S. 289, 296: Jones on Mortgages, §§ 672, 703 and cases cited.

"A tenant's possession does not change its character by an owner's giving a deed to another. If one was not in hostile occupation before the deed was given, he would not be afterwards until some change should show that the possession had ceased to be subservient and had become adverse. In this case the defendant was rightfully in possession at the time of the sale; his holding was not adverse to the purchaser who permitted him to remain in occupation, and nothing occurred afterwards to change the character of the holding on the part of the defendant. It follows, therefore, that there was no disseizin of the mortgagee and his assigns, and that their deeds

were not invalid on that account." See also *Searle v. Laraway*, 27 R. I. 557, 559.

The testimony fails to show that notice was brought to the bank of an intention on the part of George Dispeau to hold the property adversely to its title prior to the filing of the bill in equity.

We find no error in the rulings of the trial justice admitting and excluding testimony and the defendants' bill of exceptions is dismissed and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff.

Tillinghast & Collins, James C. Collins, W. Arthur Countryman, Jr., for plaintiff.

Frank T. Easton, for defendants.

MARY E. WELCH, *et al.* vs. JOHN L. CUMMINGS.

JUNE 6, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Mortgages. Foreclosure. Action for Surplus.*

Property being subject to a first mortgage of \$2,500 and a second mortgage of \$1,500, defendant, the second mortgagee, foreclosed that mortgage, and at the sale bid \$2,625.00, thinking such bid included the amount due under the first mortgage, but learning that plaintiff, the mortgagor, claimed that the bid was over and above the first mortgage, he repudiated the sale and no deed was delivered to him.

Plaintiff brought an action for money had and received to recover the surplus; *Held*, that, as no money was paid defendant and he did not receive the equivalent of any money, inasmuch as he never received the title of the mortgagors to the premises or any interest constituting a consideration sufficient to create a liability for the alleged surplus the action did not lie.

Held, further that if plaintiff had sustained any injury by the act of defendant he had his remedy in an appropriate proceeding.

ASSUMPSIT for money had and received. Heard on exceptions of plaintiff and overruled.

BLODGETT, J. This is an action for money had and received. The defendant, John L. Cummings, sold a parcel of land in

Newport to the plaintiffs, Mary E. Welch and Patrick H. Welch, and as part payment of the purchase price took a mortgage upon the premises for \$1,500.00, subject to a first mortgage for \$2,500.00 given to the Savings Bank of Newport. Default having been made in the payment of this second mortgage to the defendant, he advertised the property to be foreclosed at public auction, which auction was held on July 12, 1909. The conditions of the sale were that the purchaser was to pay ten per cent. of the purchase money at the time of the sale and the balance upon delivery of the deed, which was to be delivered at the office of Jeremiah A. Sullivan on July 17th, 1909. A further condition allowed the mortgagee to resell if the 10 per cent. was not paid, as follows: "and if after paying the 10 per cent., as above provided the purchaser shall fail to pay the balance and take the deed, he shall forfeit said 10 per cent. paid by him and the property shall again be advertised for sale and sold under said mortgage and the purchaser in default of completing his purchase shall also be liable for such damage by reason of his default."

At the sale the defendant's attorney bid \$2,600.00, the defendant raised the bid \$25.00 and the property was knocked down to him at \$2,625.00, but the defendant in making the bid thought that the bid included the \$2,500.00, the amount of the first mortgage and that he was really bidding \$125.00 towards the second mortgage. As soon as the defendant learned that the plaintiffs claimed his bid was \$2,625 over and above the first mortgage, he repudiated the sale, and no deed of the property ever passed or was delivered to him or offered to him. Before Mr. Cummings took steps to hold a second sale under his mortgage the Savings Bank foreclosed the first mortgage. This suit is brought to recover the surplus from the bid of \$2,625.00 after subtracting therefrom the \$1,500.00 to pay off the second mortgage and the expenses of foreclosure. At the trial the court directed the jury to return a verdict for the defendant inasmuch as an action for money had and received would not lie upon the facts of this case, to which direction the plaintiffs excepted and the case is now before this court on their exceptions.

- (1) In *Tripp v. Ide*, 3 R. I. 51, this court decided, page 53, "The sale" (at foreclosure under power of attorney contained in the mortgage) "at auction did not vest the legal title of the estates in the several purchasers. That could be done only by deed under seal, duly acknowledged and recorded. As to three parts of the estate there was no proof that any such deeds were ever made. The purchasers have taken no steps to compel the plaintiff to make them a legal title. What right of action the neglect of the plaintiff may confer on Ide, in whose name she was acting, we need not consider. If he suffered any injury by her wilful negligence or careless misconduct, she may have made herself liable to him for it. That matter is not now before the court."

In the case at bar it is conceded that no money was paid to the defendant nor has the latter received the equivalent of any money inasmuch as he has never received the title of the mortgages to the premises or their equity of redemption or any other title or interest therein constituting a consideration sufficient to create a liability for the alleged surplus for which suit is brought. If the plaintiffs have sustained any injury by the act of the defendant they have their remedy against him in an appropriate proceeding. But it is clear that this action for money had and received does not lie.

Plaintiffs' exception overruled and case remitted to the Superior Court for Newport County with direction to enter judgment for the defendant.

Robert M. Franklin, for plaintiff.

Burdick & MacLeod, for defendant.

JOANNA McCOMMISKEY vs. WARREN M. GREENE, Town Treasurer of COVENTRY.

MAY 29, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *State Roads. Bridges. Duty of Town to Repair.*

The provisions of Pub. Laws, cap. 982, passed April 3, 1902, entitled "An act

to provide for the construction, improvement and maintenance of State Roads" (now Gen. Laws, 1909, cap. 84) does not empower the State Board of Public Roads to do any thing with regard to bridges, but their repair and construction remains with the towns, under the statute now reenacted as Gen. Laws, 1909, cap. 83.

TRESPASS ON THE CASE for negligence. Heard on questions certified by Superior Court.

PARKHURST, J. This is an action brought by the said plaintiff against the defendant as town treasurer of the town of Coventry for injuries she alleges that she received on the second day of August, 1909, while she was driving in a carriage on the highway, passing in an easterly and westerly direction through the village of Coventry Centre and when crossing a stream flowing through said village, by means of a bridge; alleging that, while crossing said bridge, the horse broke through the same, on account of a defective plank in said bridge, causing her to be thrown from her seat and causing her severe injuries, etc.

The defendant pleaded the general issue and also a special plea in bar founded upon Public Laws of Rhode Island, Chapter 982, passed April 3, 1902; alleging that the bridge in question was part of a state road over which the town of Coventry had no control. To the special plea in bar the plaintiff replied "that the aforesaid bridge upon which she was injured as alleged in her declaration, was not any part of a state highway as averred in the defendant's said special plea in bar;" and puts herself on the country. To the replication the defendant joined issue.

The cause is now before this court to be heard upon certain questions of law certified by the Superior Court sitting in and for the county of Kent, it having been agreed between the parties that the highway described in the declaration, and called a "State Road," in the agreed statement of facts, passing through the village of Coventry Centre uses said bridge in crossing the south fork of Flat River and that "only by the use of the said bridge can travellers on said State Road passing in an easterly and westerly direction through Coventry Centre cross the said stream of water;" and that "the portion of said State Road which passes through said Coventry Centre including said

bridge was prior to its adoption as a State road, a public highway of said town of Coventry and had been such a highway for more than one hundred years."

The questions certified, as aforesaid, are:

"*First:* Is the said bridge located as aforesaid a part of the said State Road?

"*Second:* Is the town of Coventry under legal obligation to build or repair said bridge?"

The defendant's counsel earnestly contends that the bridge is a part of the State Road, and that the first question should be answered in the affirmative; and cites many authorities to the general principle that where a public highway passes over a bridge and the bridge must be used to make the highway available for travel, the bridge is a part of the highway. We have no doubt that the general principle as above stated is correct, and supported by abundant authority. But the question we are called upon to answer, depends upon the construction of Chapter 982 of the Public Laws, passed April 3, 1902, entitled "An Act to provide for the construction, improvement, and maintenance of State Roads" (now substantially re-enacted as Ch. 84, Gen. Laws, R. I. 1909). There is no question that, prior to the enactment of the said Chap. 982, the town of Coventry was liable to repair the bridge in question and for damages due to neglect to repair, under the provisions of law for many years in force and now reënacted in Chap. 83, Gen. Laws, R. I. 1909. It is to be noted that in the very first section of said Chap. 83, imposing upon towns the duty of repairing, etc., the first words used are "All highways, causeways and bridges" etc.; and the words "highways and bridges" are used in many of the succeeding sections, thus recognizing "highways" and "bridges" as subjects of separate and distinct consideration so far as repair is concerned, although they may be used as parts of the same highway in the general acceptance of that term, and subject to the same general obligations as to repair and liability for neglect.

- (1) In considering the construction of Chap. 982, above referred to, we find in the first place that the word "highways" is used

constantly throughout the act, and the word "bridges" does not appear at all. The state board of public roads created by the act is limited in its original functions to "making such recommendations for relocating, regrading or improving the main highways of the state as it shall deem for the best interests of the entire state," etc., reporting with maps showing proposed changes, etc., and probable cost, etc., and is forbidden to do any work, other than preliminary surveys, until its report shall have been approved and money appropriated. By section 4 of said act, improvement of said highways is limited to a width of fourteen feet, and improvements of additional width desired by any town or city are to be paid for by such town or city. We do not find anywhere in the act any evidence of intention on the part of the General Assembly to empower the board to do anything whatever with regard to bridges, nor does it appear that the board has ever undertaken to take possession of or do any work on bridges, or made any recommendation regarding the same to the General Assembly; and we think that the provisions of section 4 above referred to limiting the improvement of highways at State expense to fourteen feet in width is quite inconsistent with any intention sought to be implied that the act is in any way to be considered as applying to bridges. The methods of bridge repair and construction differ so radically from those employed in ordinary highway work, that we feel that it was the manifest intention of the General Assembly that the matter of repair and construction of bridges should not be confided to the State Board of Public Roads, but should be left to the towns, as provided in Gen. Laws, 1909, Chap. 83, above referred to. We feel that it would be a forced and improper construction of Chap. 982, to hold that, by implication, bridges are to be included within its provisions, when the word "bridges," used in the general laws, is expressly omitted in Chap. 982.

For these reasons, we answer the first question submitted in the negative, and decide that the bridge in question in this case is no part of the State Road, so far as to make it obligatory upon the State to amend or repair it, thereby exonerating the town of Coventry for its statutory duty under Gen. Laws, 1909, Chap. 84.

For the reasons above stated, the second question submitted is answered in the affirmative.

The papers in the case will be remitted to the Superior Court within and for the county of Kent, with our determination of the questions so submitted to this court certified thereon.

Quinn & Kernan, for plaintiff.

Ezra K. Parker, for defendant.

JOSEPH E. FALES vs. JOHN F. McDONALD.

MAY 31, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

- (1) *Sureties. Contribution. Giving Time to Principal. Agreements. Entry. Record. Judgments.*

Plaintiff and defendant were co-sureties on a bond given to release an attachment conditioned as follows:—"If the final judgment shall be forthwith paid and satisfied after the rendition thereof (in case said judgment shall be rendered against the said defendant) then this obligation shall be null and void; otherwise, shall be and remain in full force and effect." After verdict against the principal for \$6,323.85, the case being in the Supreme Court on exceptions the following agreement signed by counsel, was filed May 26, 1909. "Bill of exceptions withdrawn and case remitted to the Superior Court for further proceedings," and the same day the following agreement was filed in the Superior Court. "In the above entitled cause it is agreed that the following entry be made. Judgment and execution stayed until June 26, 1909. Upon payment of \$5,625.00 on or before June 25, 1909, case to be entered settled, otherwise execution to be issued on June 26, 1909, for full amount of judgment, interest and costs." This agreement was signed by the parties and by the court. July 1, 1909, an agreement of settlement was entered, and the same day plaintiff paid to the plaintiff in the original action the sum of \$5,625.00.

Plaintiff brings assumpsit against defendant his co-surety for contribution to the extent of one half of the amount paid.

Held, that the agreement filed in the Superior Court was the joint petition of both parties that a certain record be made, and being signed by the justice, the petition was granted and the clerk empowered to make such record, and the paper being filed by the clerk it was made a part of the record of the case, whether formally extended at that time upon the record books or not.

Held, further that the meaning of the entry was that judgment was entered for the plaintiff on the verdict on May 26, and execution stayed until June 26. Therefore final judgment was rendered and entered and the sureties became liable on the bond unless the stay operated to discharge them.

Held, further that the burden of proof to show that the whole transaction extended the time by which in the ordinary course of litigation the judgment creditor could have obtained execution against his judgment debtor, was upon the surety and defendant had failed to sustain such burden.

Held, further that while a surety who voluntarily pays a debt before he is under legal liability so to do, cannot enforce contribution against his co-surety, yet in this case, as plaintiff did not pay the money until July 1, he did not pay the debt before he was under a legal obligation to do so.

ASSUMPSIT. Heard on exceptions of plaintiff and sustained.

DUBOIS, C. J. This is an action of assumpsit brought by one surety upon a bond, given to release personal property from attachment against his co-surety for contribution to the extent of one-half of the sum of \$5,625.00, which the plaintiff alleges that he has been obliged to pay to satisfy a verdict which had been found against one John M. Peck, the principal in said bond.

It appears that on the 6th day of February, 1907, Arthur P. Johnson, trustee in bankruptcy of Benjamin W. Comstock, commenced suit against John M. Peck, doing business as the Eastern Dry Goods Company, by issuing a writ of attachment, returnable to the said Superior Court of said county of Providence, on the 23rd day of February, A. D. 1907, and is numbered Law. No. 22645, on the files of the said Superior Court. That certain personal property of the said John M. Peck was attached by Andrew McKenzie, deputy sheriff of said county of Providence, by virtue of said writ of attachment. That on the 8th day of February, 1907, said John M. Peck, as principal; the plaintiff, Joseph E. Fales, and the defendant, John F. McDonald, as sureties, gave bond in the sum of ten thousand dollars to Hunter C. White, sheriff of the said county of Providence, and said Andrew McKenzie, deputy sheriff of the said county of Providence, for the release of said personal property from said writ of attachment. That said case of *Arthur P. Johnson, Trustee v. Eastern Dry Goods Company* was tried in the Superior Court of said county of Providence before Mr. Justice Charles F. Stearns, and a jury on the 2nd, 3rd, 4th, 5th and 6th days of November, 1908, and a verdict was rendered by the jury in favor of said Arthur P. Johnson, Trustee, for the sum of \$6,323.85. That a motion for a new trial was duly filed in the case of *Arthur P. Johnson, Trustee, v. Eastern Dry Goods Company* by said Eastern Dry Goods Company, and was heard and denied by Mr. Justice Charles F. Stearns. That said Eastern Dry Goods Company filed a bill of exceptions to the denial of said action for a new trial, within the time required by law. That said bill of exceptions was assigned for hearing in the Supreme Court May 28th, 1909 by the following agreement:

"In the above entitled cause it is agreed that the following entry be made:—

Assigned for hearing May 28, 1909.

(Signed) ALFRED S. JOHNSON & DEXTER B. POTTER,
Plff's Attorneys.

(Signed) BASSETT & RAYMOND,
Deft's Attys."

That on the 26th day of May, 1909, the following agreement was filed in the Supreme Court in the case of *Arthur P. Johnson, Trustee v. Eastern Dry Goods Company*:—

"Supreme Court, May 26, A. D. 1909.

ARTHUR P. JOHNSON, Trustee	}	No. Ex. 4173.
vs.		
EASTERN DRY GOODS COMPANY		

In the above entitled cause it is agreed that the following entry be made:—

Bill of exceptions withdrawn and case remitted to the Superior Court for further proceedings.

(Signed) ALFRED S. JOHNSON & DEXTER B. POTTER
Plff's Attys.

(Signed) BASSETT & RAYMOND, *Deft's Attys."*

That on the 26th day of May, 1909, the following agreement, after said case was remitted to the Superior Court, was filed in the Superior Court in the said case:

"PROVIDENCE, Sc. Superior Court, May 26, A. D. 1909.

ARTHUR P. JOHNSON, Trustee	}	No. 22645.
vs.		
EASTERN DRY GOODS COMPANY		

In the above entitled cause it is agreed that the following entry be made:—

Judgment and execution stayed until June 26, 1909. Upon payment of \$5,625.00 on or before June 25, 1909, case to be entered settled; otherwise, execution to be issued on June 26, 1909, for full amount of judgment, interest and costs.

(Signed) ALFRED S. JOHNSON & DEXTER B. POTTER,
Plff's Attys.

(Signed) BASSETT & RAYMOND, *Deft's Attys.*

(Signed) CHARLES F. STEARNS, J."

That on the first day of July, 1909, the following agreement was filed in the Superior Court in said case:—

“PROVIDENCE, SC. Superior Court, July 1, A. D. 1909.

ARTHUR P. JOHNSON, TRUSTEE	}	No. 22645.
vs.		
EASTERN DRY GOODS COMPANY		

In the above entitled cause it is agreed that the following entry be made:—

“Settled, no costs.”

(Signed) ALFRED S. JOHNSON & DEXTER B. POTTER,
Plff's Attys.

(Signed) BASSETT & RAYMOND, *Deft's Attys.*”

And that said Joseph E. Fales paid to Arthur P. Johnson, Trustee, the sum of \$5,625 on the 1st day of July, 1909.

The condition of the bond above referred to is as follows: “Now, therefore, if the final judgment in the action commenced by said writ shall be forthwith paid and satisfied *after the rendition thereof* (in case *said judgment* shall be rendered against the said defendant), then this obligation shall be null and void; otherwise, shall be and remain in full force and effect.”

Upon jury trial in the Superior Court, at the conclusion of testimony upon motion of the defendant, the court directed the jury to return a verdict for the defendant. The plaintiff excepted to this ruling and filed his bill of exceptions which was duly allowed and the case is now before this court for the consideration thereof.

The plaintiff's exceptions are as follows:

“1. The ruling of the court in refusing to direct a verdict for the plaintiff, which said exception appears on page twenty-six of the transcript of testimony.

“2. The ruling of the court in directing a verdict for the defendant, as appears by the exception taken to said ruling on page twenty-six of the transcript of testimony.”

The defendant urges the following considerations in support of the ruling of the court:

“1. That a surety who voluntarily pays the debt before

he is under legal liability, so to do, cannot enforce contribution against his co-surety.

"2. That final judgment in the attachment suit was neither rendered nor entered, and that final judgment in the attachment suit must be rendered by the court and entered by the clerk of the court before sureties are liable under the bond, under an agreement, as follows:—

"Judgment and execution stayed until June 26, 1909. Upon payment of \$5,625.00 on or before June 25, 1909, case to be entered settled; otherwise, execution to be issued on June 26, 1909, for full amount of judgment, interest and costs.'

"3. That the stay of judgment and execution, for one month, by the creditor and principal debtor, without the knowledge or consent of the surety, after trial of the case and after the bill of exceptions is withdrawn from the Supreme Court and the case is remitted to the Superior Court for further proceedings is an extension of time to the principal debtor and therefore discharges the surety from all liability on an attachment bond."

The correctness of the first proposition may be at once conceded and if it is found to be applicable in the case at bar the plaintiff will have no cause to complain of the ruling of the Superior Court.

- (1) The second proposition cannot be disposed of so readily. It involves a consideration of the paper filed in the Superior Court May 26, 1909, in the case of *Arthur P. Johnson, Trustee v. Eastern Dry Goods Co.* No. 22645. It is an agreement "that the following entry be made." The definition of the word "entry" according to Bouvier Law Dict. is as follows—"In Practice. The placing on record the various proceedings in an action, in technical language and order. The extreme strictness of the old practice is somewhat relaxed, but the term entry is still used in this connection. In the law books the words *entry* and *entered* are frequently used as synonymous with recorded; 130 N. Y. 504. See 100 Ill. 484; 54 Cal. 519; 74 Ind. 59." It is therefore equivalent to an agreement that a certain docket entry or record be made. But the docket entries are

made and the court records are kept by the clerk under the direction of the court, and no clerk would make such a record without an order of the court; so that the agreement in reality is the joint petition of both parties for the court to cause a certain docket entry or record to be made. As this paper was signed by the justice who presided at the trial of the case in the Superior Court the petition was granted and the clerk was empowered to make the necessary record. In these circumstances the filing of the paper by the clerk made it a part of the court record of the case whether he then formally extended it upon the record books or not. What is the entry so made: "Judgment and Execution stayed until June 26, 1909." Does it mean judgment entered and execution stayed until the date specified; or does it mean that both are to be stayed? Let us examine the remainder of the entry: "Upon payment of \$5,625.00 on or before June 25th, 1909, case to be entered settled; otherwise execution to issue on June 26, 1909 for full amount of judgment interest and costs." For full amount of what judgment? A judgment entered May 26, or a judgment to be entered June 26? We are of the opinion that the intention and meaning to be gathered from the entry is that judgment was entered for the plaintiff on the verdict on May 26th, 1909, and that execution was stayed until June 26, 1909. Therefore final judgment was rendered and entered and the sureties thereupon became liable on the bond unless the stay of execution operated to discharge the sureties. Even if judgment was stayed until June 26, 1909, under the entry there would be no necessity for another rendition thereof by the court and the same would be final as of that date and the sureties would be liable on the bond unless discharged by the stay aforesaid. As the plaintiff did not pay the sum of \$5,625 to Arthur P. Johnson, Trustee, until the first day of July, 1909, he did not pay the debt before he was under a legal obligation to do so. Under the docket entry execution could have been issued June 26, 1909, and the liability of the sureties to pay the judgment was already fixed before the time of said payment unless the stay of judgment and execution exonerated them. It is well

settled that if a creditor or obligee by a valid and binding agreement, without the assent of the surety, gives further time for payment or performance to the principal debtor, the surety will be discharged. 32 Cyc. 191 and cases cited; 27 Am. & Eng. Ency. Law, 499 and cases cited. The burden of proof to show an extension of time is on the surety. Any evidence, otherwise competent, tending to show the contract is admissible, but a writing which apparently amounts to an extension may be explained. 32 Cyc. pp. 213 and 214, and cases cited. In the case at bar all the facts and circumstances leading up to and surrounding the agreement, which it is claimed was an extension of time to the principal debtor and thereby operated to extinguish the liability of his sureties, must be taken into consideration. It already appears that on the sixth day of November, 1908, Arthur P. Johnson, Trustee, recovered a verdict against the Eastern Dry Goods Company in the suit in which the goods of John M. Peck had been attached and released from said attachment by the bond in which said Peck is principal and the plaintiff and defendant in the present suit are sureties. That the Eastern Dry Goods Company made a motion for a new trial, which was heard and denied, and that thereupon said Eastern Dry Goods Company took exception to said refusal and duly filed its bill of exceptions which ultimately reached this court and was assigned for hearing herein May 28, 1909; that on the twenty-sixth day of said May the parties to the original suit entered into two agreements, by the first of which the bill of exceptions was withdrawn from this court and the case was remitted to the Superior Court for further proceedings; and by the second thereof, June 26, 1909, was fixed as the time when execution should issue for the full amount of judgment, interest and costs unless the sum of \$5,625 should be paid on or before June 25, 1909. Whether the whole transaction, for it appears as one, by which the case was taken out of this court and the time for execution to issue, fixed at one month from that date, extended the time by which in the ordinary course of litigation the judgment creditor could have obtained execution against his judgment debtor is the problem thus offered for solution.

Taking into consideration the fact that the parties were ready to pay and receive respectively a sum approximately a thousand dollars less than the amount of the verdict, with interest and costs, it does not seem unlikely that they regarded the transaction as one in which payment was to be accelerated rather than delayed. Of course it was impossible to predict within what time cases to be heard May 28, 1909, would be decided, but we are now able to state from an examination of the calendar of that day at what time the cases that were then heard were decided. Two cases were argued upon that day; the first was decided and a rescript containing the decision was filed July 7, 1909. In the other case an opinion was handed down July 6, 1909. There is nothing to indicate that if the case under consideration had been reached and argued before the adjournment of court, upon that day, that it could have been decided in advance of the other cases upon the calendar. As we have already seen the burden of proof to show that time was actually extended is upon the defendant and he has utterly failed to sustain that burden. Instead of being injured by the arrangement that was made, he is actually benefited to the amount of about five hundred dollars and has no cause for complaint. In some of its features the case of *Bothfield v. Gordon*, 190 Mass. 567, 571, resembles the present one under consideration. In the course of his opinion, Hammond, J., makes the following pertinent remarks: "The first ground of the defence is that by the agreements for judgment and stay of execution in the actions against the principal debtor time was given to him without the consent of this defendant. The actions were pending in the Newton Police Court, and inasmuch as the agreements were signed by an attorney in behalf of the defendant therein, it fairly may be assumed that the actions were being contested. It does not appear at what time the actions in the ordinary course of business in that court would have gone to judgment, but even if the defendant therein had been then defaulted he could have appealed to the Superior Court, and it is manifest that in the ordinary course of proceeding in the appellate court the cases could not have been reached for trial until after Feb-

ruary 15, 1903, the time to which the stay of execution under each agreement extended; and the defendant in the case before us does not argue to the contrary.

"It is to be observed that this is not a case where an agreement for a stay of execution is made concerning a judgment already in force and upon which the judgment creditor at the time of the agreement has the right to take out execution, as in *Gipson v. Ogden*, 100 Ind. 20, and many other cases cited by the defendant. In the case before us the plaintiffs at the time of the agreement had no judgment. The agreement for a stay of execution was a part of that under which the judgment was obtained, and there is nothing to show that the agreement for judgment could have been then obtained without the clause relating to a stay of execution. Nor is it a case where by the agreement for the stay of execution the time is extended beyond the time in which in the ordinary course of judicial proceedings it could have been obtained, as in *Wingate v. Wilson*, 53 Ind. 78, and several other cases cited by the defendant. The plaintiffs were prosecuting their claim by a suit against Gordon, the principal debtor, who had entered upon an active defence. By the agreement they obtained the right to an execution within a time shorter than that required by the ordinary course of judicial procedure. Although there is some conflict in the authorities, yet we think that upon principle and the great weight of authority such an agreement is not a giving of time within the true meaning of the phrase as contained in the general proposition that the giving of time to the principal discharges the surety. As stated in *Hulme v. Coles*, 2 Sim. 12: 'Time was not given, but the remedy was accelerated.' Among other cases supporting this view, see *Fullam v. Valentine*, 11 Pick. 156; *Stevenson v. Roche*, 9 B. & C. 707; *Price v. Edmunds*, 10 B. & C. 578; *Fletcher v. Gamble*, 3 Ala. 335."

For the foregoing reasons we are of the opinion that the justice presiding at the trial in the Superior Court was in error in directing the jury to find a verdict in favor of the defendant, which he did in the following words: "Gentlemen, counsel for

both plaintiff and defendant in this case agree that it is a question of law for the court to decide; each contend that a verdict should be directed in their favor. I will direct you to return a verdict in favor of the defendant." As it appears that counsel for plaintiff and defendant agree that it is a question of law for the court to decide and that there is no disputed question of fact for the determination of a jury, the case will be remitted to the Superior Court with direction to enter judgment for the plaintiff in the sum of \$2,812.50 with interest thereon from the first day of July, 1909, unless the defendant on the fifth day of June, 1911, at 10 o'clock A. M., can show cause why such judgment should not be entered.

Bassett & Raymond, for plaintiff.

R. W. Richmond, of counsel.

A. B. Crafts, William H. McSoley, for defendant.

STATE *vs.* WILLIS E. ALMY.

JUNE 1, 1911.

PRESENT: Dubois, C. J., Johnson, Parkhurst, and Sweetland, JJ.

(1) *Intoxicating Liquors. Constitutional Law. Evidence.*

Gen. Laws, 1909, cap. 123, § 52, provides that "the finding of any liquors enumerated in this section upon the premises of any retail druggist or apothecary in quantities exceeding one half gallon shall be considered evidence that the same is kept for sale."

Held, that the section was not obnoxious to the provisions of Cons. U. S. Art. XIV of amendments § 1, nor to Cons. of R. I. Art. 1, § 10, for in carrying out a public purpose, while it might be limited in its application, yet within the sphere of its operation it affected all persons similarly situated.

Held, further that the intent of the section was to prohibit the keeping of intoxicating liquor in quantities exceeding one half gallon whether it consisted of one kind only or was the aggregate of several kinds.

(2) *Premises of Defendant.*

Held, further that the statute being designed to prohibit the selling and keeping of intoxicating liquor in the shops and stores of druggists, the word "premises" meant the *business premises* of those persons.

(3) *Prima Facie Evidence. Constitutional Law.*

While the court held in *State v. Beswick*, 13 R. I. 211, that a provision which

made certain recited circumstances *prima facie* evidence against an accused was unconstitutional, as determining in advance what weight certain facts should have with the jury, in the present statute, the provision that certain facts "shall be considered as evidence that the same is kept for sale" is no more than declaratory of the common law as it existed before the statute, such facts being admissible in evidence against an accused but the weight that should be given them, being for the jury to determine.

CRIMINAL COMPLAINT. Certified on constitutional questions.

DUBOIS, C. J. The defendant was tried in the District Court of the Third Judicial District upon the following complaint: "To Edward G. Cundall, Esq., Clerk of The District Court of the Third Judicial District, in the County of Washington, and State of Rhode Island and Providence Plantations. Cornelius Bransfield, Chief of Police of the town of Westerly in said county, on oath complains, in the name and behalf of the State, that at said Westerly in said county, on the 15th day of December, A. D. 1909, with force and arms Willis E. Almy, alias John Doe, of said Westerly, he the said Willis E. Almy, alias John Doe, being then and there, and for a long time prior thereto, a retail druggist, did then and there keep for sale ale, wine, rum, and other strong and malt liquors, and mixed liquors a part of which was ale, wine, rum and other strong, malt and intoxicating liquors, without first obtaining a licence from the town council of said town of Westerly, against the statute and the peace and dignity of the State.

"And said complainant further complains, on oath in the name and behalf of the state, that at said Westerly, in said county, on said 15th day of December, A. D. 1909, with force and arms, said respondent, Willis E. Almy, alias John Doe, being then and there, and for a long time prior thereto, an apothecary, did then and there keep for sale, ale, wine, rum, and other strong and malt liquors, and mixed liquors a part of which was ale, wine, rum and other strong, malt and intoxicating liquors, without first obtaining a license from the town council of said town of Westerly, against the statute and the peace and dignity of the State." The complaint was brought under the provisions of Gen. Laws, 1909, cap. 123, § 52. During the

trial testimony was offered of the finding, in the shop occupied by the defendant as a retail drug store, of about five quarts of whiskey, one and two-thirds quarts of brandy and one half bottle of Scotch whiskey. The defendant objected to the introduction of the testimony upon the ground that the portion of said section 52 which provides that "The finding of any liquors enumerated in this section upon the premises of any retail druggist or apothecary, in quantities exceeding one half gallon, shall be considered evidence that the same is kept for sale," is unconstitutional. The testimony was admitted, notwithstanding the objection of the defendant, the decision of the question of constitutionality was reserved, and the trial proceeded.

The respondent offered no evidence in his own behalf and was found guilty, but sentence was stayed and the constitutional questions raised were certified to this court for decision, under the provisions of Gen. Laws, 1909, cap. 298, § 2.

- (1) The certification contains fifteen specifications of unconstitutionality but at the hearing upon the same before this court, the defendant desired the inquiry to be limited to the consideration of whether the statute in question violates the provisions of section one of the fourteenth amendment to the Constitution of the United States or those of section 10 of Article one of the Constitution of Rhode Island. Section one, Article XIV of Amendments to the Constitution of the United States reads as follows: "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." And the provisions of Sec. 10, Article 1 of the Constitution of Rhode Island are the following: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed

of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property; unless by the judgment of his peers, or the law of the land."

The defendant thereupon argued as follows: "What is the proper construction of the statute that is now Section 52 of Chapter 123 of the General Laws, 1909.

"The first part of said section provides a penalty for the sale or keeping for sale, by any retail druggist or apothecary, without first obtaining a license, of any ale, wine, rum, or other strong or malt liquors, etc., and later on it is provided that 'the finding of any liquors enumerated in this section upon the premises of any retail druggist or apothecary in quantities exceeding one half gallon shall be considered evidence that the same is kept for sale.'

"It is to be noted that the plural is used in speaking of 'liquors' and 'quantities' but that the provision in relation to evidence is that the same 'is' kept for sale instead of 'are' kept for sale. The provision is the finding of any liquors enumerated not the finding of any 'of' the liquors enumerated. It is not to be presumed that the legislature made a grammatical error. In case of doubt as to the meaning of a criminal statute the doubt must be resolved in favor of the defendant. It follows that the meaning of the statute is that the excess of one half gallon must be of one kind of liquor and not the aggregate of several kinds."

A sufficient reply to the foregoing is that under the provisions of Gen. Laws, 1909, cap. 32, "Of the Construction of Statutes," Sec. 3, it is provided that "Every word importing the singular number only, may be construed to extend to and to include the plural number also; and every word importing the plural number only, may be construed to extend to and to embrace the singular number also."

In our opinion it is the intention of the legislature, as expressed in the section under consideration, to prohibit the keep-

ing of intoxicating liquor in quantities exceeding one half gallon, whether it consists of one kind only or is the aggregate of several kinds.

The defendant further argued that "The finding referred to is upon the 'premises' of a retail druggist or apothecary, not within his shop. The dwelling house of a retail druggist or apothecary is as much his premises as his shop. Each is occupied by him, and it cannot be said that in using the general term 'premises' it was intended to include one class or purpose of occupation and exclude another. It is not for the court to read into this statute words that are not there. It therefore follows that if a retail druggist or apothecary has more than two quarts of liquor of one kind in his dwelling-house, it is evidence that it is kept for sale, while his next door neighbor engaged in another occupation may have a much larger quantity without any such presumption being raised. The result is the same if it is held that the Statute applies when the aggregate of all the liquors found exceeds one-half gallon."

- (2) The foregoing argument is more specious than sound. The word *premises* is frequently used in Gen. Laws, cap. 123, but a consideration of its use in secs. 52, 53, 54 and 55 of said chapter, in connection with retail druggists and apothecaries, may be of some assistance. In sec. 52 any retail druggist or apothecary who shall sell or keep for sale intoxicating liquors without first obtaining a license shall be liable to the penalties therein prescribed. The intent and purpose of this section undoubtedly is to prohibit retail druggists or apothecaries from selling or keeping for sale the liquors referred to in their capacity as druggists or apothecaries, that is, in connection with and as a part of their regular business. It is a well recognized fact that an apothecary shop or drug-store furnishes unusual facilities for the sale and keeping of intoxicating liquor. That opportunities for its disguise or concealment abound. That the profits to be derived from unlicensed sales are a sufficient temptation to arouse the cupidity of the avaricious, and to lead them to take the risk incident to the undertaking. That unscrupulous persons have been known to engage in the drug business

ostensibly for the purpose of conducting a legitimate apothecary shop but with the covert purpose of using the same as a cloak or shield for an illegal business. It is not a violent presumption to assume that the general assembly had these considerations in mind at the time of the passage of the statute in question and that its provisions were designed and adapted to counteract such illegal tendencies. It is therefore reasonable to suppose that the selling and keeping of intoxicating liquor was thereby prohibited in the shops and stores of the apothecaries and druggists. Therefore the words "the finding of any liquors enumerated in this section upon the premises of any retail druggist or apothecary" apply to the finding of the same in the shop or store or other portion of the *business premises* of those persons. This construction is strengthened by an examination of the provisions of section 53 whereby the town councils of the several towns, and the boards of license commissioners, may grant or refuse to grant licenses, to be known as druggists' liquor licenses, to such persons as are by law authorized to retail, compound and dispense medicines and poisons, for the sale of pure, spirituous and intoxicating liquors in quantities not to exceed one pint, or in an original package containing not more than one quart, for medicinal purposes only, and not to be drunk on the premises of the seller. In order to ascertain what persons are by law authorized to retail, compound and dispense medicines and poisons it is necessary to examine the provisions of Gen. Laws, 1909, cap. 178 "Of Medicines and Poisons," and we find that under sec. 1. "No person, unless a registered pharmacist, or registered assistant-pharmacist in the employ of a registered pharmacist, or unless acting as an aid under the immediate supervision of a registered pharmacist or a registered assistant-pharmacist, within the meaning of this chapter, shall retail, compound or dispense medicines or poisons except as hereinafter provided." The exception, contained in sec. 10, relates to any practitioner of medicine *who does not keep open shop* for the retailing, dispensing or compounding of medicines or poisons. The statute provides for an examination of the qualification of

applicants for certificates of registration as a registered pharmacist or as a registered assistant-pharmacist, and for the issuance of certificates to properly qualified persons who shall comply with the requirements of the statute. Sec. 6 provides that the certificate shall be used by the person to whom it is issued in but one place of business, but also provides for permission for removal. It thus appears that persons to whom druggists' liquor licenses may be issued must have a place of business, and the words "premises of the seller," in Gen. Laws, cap. 123, § 53, relate to the place of business of such person. Sec. 54 provides for the punishment to be meted out to the retail druggist or apothecary, or any clerk or assistant thereof, who shall upon prohibited days or hours, sell, distribute, give or deliver intoxicating liquors in any retail druggist's or apothecary's shop, unless the same be sold upon and in accordance with the written prescription of a physician and *not to be drunk on the premises*. Sec. 55 relates to similar offences when committed on week days. While it may be said that the dwelling house of a retail druggist is as much his premises as his shop, if he owns them both, he does not own or occupy his house because he is a druggist. His ownership of his house and land is in no way dependent upon his occupation or employment, but he cannot legally occupy the drug store or apothecary shop unless he has the necessary certificate as has already been shown and he is not eligible to receive a druggist's liquor license unless he has a shop, or store wherein it can operate. And if he, as a druggist or apothecary, has a shop or store wherein a druggist's license could operate, if he had one, those are his business premises; and, in case he has no such druggist's liquor license, those are the premises wherein he must not sell or keep for sale intoxicating liquor in prohibited quantities.

We are unable to see wherein the statute under consideration is obnoxious to either of the constitutional provisions hereinbefore referred to.

As was said by Mr. Justice Field, speaking for the Supreme Court of the United States, in *Barbier v. Connolly*, 113 U. S. 27, 31 *et seq.*: "The Fourteenth Amendment, in declaring

that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation to life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the employment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor, any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground

of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

"In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State." The definition was quoted and approved in *Yick Wo v. Hopkins*, 118 U. S. 356, 367.

In the case at bar no impediment is imposed by the statute to the pursuits of the defendant as a retail druggist or apothecary, except as applied to the same pursuits by others under like circumstances, and no greater burdens are laid upon him than are laid upon others in the same calling and condition. This statute comes well within the above definition as "legislation which in carrying out a public purpose is limited in its application" and "within the sphere of its operation affects all persons similarly situated" and is therefore not within the fourteenth amendment.

- (3) The defendant claims that the portion of Sec. 52 hereinbefore referred to: "The finding of any liquors . . . upon the premises of any retail druggist or apothecary, in quantities exceeding one half gallon, shall be considered evidence that the same is kept for sale," is unconstitutional for the reasons given in *State v. Beswick*, 13 R. I. 211, 215, *et seq.* The difference between the statute involved in that case and the one in this, in the respect complained of, is that the former statute *inter alia* made the notorious character of the defendant's premises *prima facie* evidence of his guilt. That is, the legislature determined in advance what weight certain facts should have

with the jury, "so that upon proof of them it is not only the right but the duty of the jury to convict, unless the presumption is rebutted by other evidence." In the present statute under consideration certain facts "shall be considered as evidence that the same is kept for sale." This was nothing more than declaratory of the common law as it existed before the statute. Proof of the quantity, quality, place of keeping and all the circumstances surrounding the finding of forbidden articles in the place of business of a defendant would have been admissible in evidence for the prosecution and against the accused but the weight that should attach to the same was and is clearly within the province of the jury to determine. The circumstances attending the possession of prohibited articles are always matters for the consideration of the jury and so long as the legislature has not attempted to curtail the functions of the jury but has left them to determine the weight of such evidence, the statute cannot be held to be unconstitutional. As was said by Durfee, C. J. in *State v. Wilson*, 15 R. I. 182: "Section 3 (of Pub. Stat. cap. 80) as we interpret it, simply makes the reputation of a place evidence of its character, but it leaves the jury free to find the accused guilty or not, according as they are satisfied of his guilt or not by the evidence. We see no reason to think that such an enactment is unconstitutional."

Having thus decided the questions certified to us, the papers in the cause with our decision certified thereon, will be sent back to the District Court of the Third Judicial District for further proceedings.

Harry B. Agard, for complainant.

Clarence A. Aldrich, for defendant.

In re JOHN W. HALL, *et al.* Petitioners.

JUNE 5, 1911.

PRESENT. Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Partnership. Capital. Dissolution. Profits. Depreciation of Capital.*

A. and B. were co-partners a provision of their articles of agreement as to

dissolution being as follows:—"After all the affairs of the copartnership are adjusted and its debts paid off and discharged, then all the stock and stocks as well as the gains and increase thereof which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise, shall be divided equally between the parties."

A. contributed \$500 as his share of the capital and B. contributed certain apparatus. The firm was also indebted to A. for money loaned.

Upon the question of the distribution of the assets in dissolution;—

Held, that there being no indebtedness to creditors of the firm, the money loaned by A. should first be repaid and then the amount of capital contributed by A. and B., should be adjusted and paid, before any division of profits should be made.

Held, further that the depreciation caused by the use of the apparatus contributed by B. should be borne by the firm, and having been ascertained the amount found to be due should be repaid him, each partner contributing one-half.

Held, further that if the capital contributed by A. had also suffered a loss, that should be ascertained as well and repaid in the same manner, and thereafter a division of the profits should be made in the proportion provided by the agreement.

CASE stated for opinion, under Gen. Laws, 1909, cap. 289, § 20.

DUBOIS, C. J. This is a petition in equity for an opinion, brought under the provisions of Gen. Laws, 1909, cap. 289, § 20, and reads as follows:

"To the Honorable the Supreme Court.

"Respectfully represent John W. Hall, of Phenix in the town of Warwick, county of Kent, State of Rhode Island, and Frank G. Smith of Phenix, in the town of Warwick, county of Kent, State of Rhode Island, and show to the Court the following facts:

"That your petitioners are copartners doing business in Warwick under the name and style of Frank G. Smith Forestry Company, and that their copartnership affairs are now in the process of liquidation; that your petitioners have adversary interests in certain questions which have arisen upon the construction of their contract of copartnership, and they concur in stating such questions in the form of a special case for the opinion of this Honorable Court.

"To the end that the Court may have all the facts set forth, it is agreed as follows:

"FIRST. That John W. Hall and Frank G. Smith, both of Warwick, entered into a contract of copartnership in writing for a period of six months for the purpose of carrying on the business of spraying, trimming, and treating of trees, a copy of said contract of copartnership being hereto annexed and marked Exhibit A. and made a part of this bill.

"SECOND. That said contract of copartnership was dissolved by mutual consent of both parties before its expiration, and notice of such dissolution duly given according to law.

"THIRD. That there are no debts owing by said copartnership.

"FOURTH. That said John W. Hall, from time to time, during the continuance of said copartnership, made certain loans of money to said copartnership, which have been repaid to said Hall with the exception of \$26.40.

"FIFTH. That said John W. Hall, at the inception of said contract of copartnership contributed capital in the sum of \$500, as set forth in the third clause of the contract of copartnership, and that Frank G. Smith contributed part of the apparatus to be used in said business, which consist of a spraying pump, hose, one extension ladder, and five saws; that in the course of the settlement of their copartnership affairs, certain questions have arisen concerning the capital of said copartnership, namely, whether the full amount of capital contributed by said John W. Hall should be returned to him before a division of profits occurs, or whether the said Hall should divide said capital with said Frank G. Smith, and whether the money advanced by the said Hall to said copartnership for copartnership purposes should be repaid to him before there can be a division of property.

"Upon the questions hereinbefore mentioned, your petitioners pray for an opinion of Your Honors upon the true construction of their said contract of copartnership, and for the opinion and advice of Your Honors as to their respective rights

in and to the capital mentioned in said contract of copartnership, and what are the respective rights of the respective parties, and for such other and further relief as to Your Honors shall seem meet.

FRANK G. SMITH

JOHN W. HALL.

QUINN & KERNAN

Att'ys for Frank G. Smith

FRANK M. WILCOX

Att'y for John W. Hall.

"ARTICLES OF COPARTNERSHIP.

"Made and entered into this 28th day of March, A. D. 1910, between Frank G. Smith, of the town of Warwick in the County of Kent and State of Rhode Island, and John W. Hall, of said Warwick.

"WITNESSETH: that the said parties hereto, having mutual confidence in each other, do hereby form with each other a copartnership agreement on the terms and conditions following, that is to say:

"FIRST: The copartnership shall be for the carrying on of the business of spraying, trimming and treating of trees and to commence on the 28th day of March, A. D. 1910, and to continue six months, determining on September 28th, 1910.

"SECOND: The said copartnership shall be conducted and carried on under the copartnership name, style and firm of The F. G. Smith Forestry Company, and the place of business shall be at the Hoxie Block in the village of Phenix in said Warwick or at such other place or places as the partners shall hereafter determine.

"THIRD: The capital of said copartnership shall consist of the sum of five hundred dollars to be contributed by said John W. Hall and the apparatus to be used in said business now owned by said Frank G. Smith and to be contributed by him, the same, together with all the income and profits arising from the employment thereof, with the exception of what each is entitled to draw out as hereinafter mentioned, shall become and

constitute a permanent fund for copartnership purposes. But each party is entitled to draw out from the profits of the said business (for his own separate account) as follows: Frank G. Smith, Twenty Dollars (\$20.00) per week, John W. Hall Fifteen Dollars (\$15.00) per week, while the said copartnership continues, but with the condition that all such sums in the aggregate for the term shall not exceed his share of the profits of the said copartnership, and if he do, he shall repay the same at the close of the term; the agreement being that each copartner shall share equally in all the profits and losses that may arise out of, or occur in, the prosecution of the said copartnership operations, with the exception that the additional five dollars (\$5.00) per week to be drawn out by said Frank G. Smith shall not be charged up against his share of the said profits but shall be considered as additional compensation for his experience.

"FOURTH: That each of the parties hereto shall diligently employ himself in the business of the said copartnership, and be faithful to the other in all transactions relating to the same, and give whenever required, a true account of all business transactions arising out of, or connected with, the conducting of the copartnership, and that neither of the parties shall engage in any business except that of the said copartnership or upon account thereof, and that neither shall without the written consent of the other, employ either the capital or credit of the copartnership in any other than the copartnership business.

"It being understood and agreed that the said John W. Hall shall have the charge of the office and shall keep the books of said partnership, that he, the said John W. Hall shall have exclusive charge of all the financial details of said copartnership, including the receiving and collecting of all monies due said copartnership and the paying of all monies due to any person or persons, corporation or corporations, from said copartnership, whether in the general conduct of said business or otherwise, and said Frank G. Smith shall have the actual outside working management of said copartnership business, but in no instance shall the said Frank G. Smith receive, collect, handle, or pay out any monies due to said copartnership.

"FIFTH. That books of account shall be kept by said partners, and entries made therein of all moneys, goods, effects, debts, sales, purchases, receipts, payments, and all other transactions of the said partnership; and that said books of account, together with all bonds, notes, bills, assurances, letters, and other writings belonging to the said partnership, shall be kept where the business of the copartnership shall be carried on and shall be at all times open to the examination of each copartner, said books to be kept in the exclusive custody of the said John W. Hall, and all partnership monies received from any and all sources shall be deposited by the said John W. Hall in the name of the F. G. Smith Forestry Co. in the _____ bank of _____ and shall be withdrawn therefrom only by check drawn and signed by said John W. Hall.

"SIXTH. Neither one of the partners during the continuance of this copartnership, shall assume any liability for another or others by means of endorsement or of becoming guarantor or surety, without first obtaining the consent of the other thereto in writing.

"SEVENTH. At the expiration of each and every month from the commencement of this copartnership, or oftener upon request in writing by one copartner to the other, an account of stock, effects, credits, debts, and all copartnership transactions shall be taken, and the true condition of the partnership, as far as possible, arrived at, and each partner agrees to lend his aid and services the more completely to effect this object. And in case of the determination of this copartnership from whatever cause, the parties hereto agree to and with each other, that they will make a true, just and final account of all things relating to their said business, and in all things truly adjust the same. And after all the affairs of the copartnership are adjusted, and its debts paid off and discharged then all the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise, shall be divided equally between the parties hereto.

"EIGHTH. It is hereby understood and agreed that upon the 1st day of July, 1910, if the books of the said copartnership disclose a balance of funds over and above all outstanding claims, the accrued profits of said business as shall appear by the books shall be equally divided between said parties and withdrawn from said business, leaving, however, the original capital intact.

"In Testimony whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

In presence of

William R. Champlin.

FRANK G. SMITH (L. S.)

JOHN W. HALL (L. S.)

- (1) The case above stated comes within the general rule governing the repayment of capital in copartnerships at the termination thereof: "The capital furnished by any party is, in the absence of agreement to the contrary, a debt owing by the firm to the contributing partner; and accordingly it is to be repaid to him, if the firm assets are sufficient, after paying the firm's liabilities to outsiders and to the partners for advances or loans, to repay the entire capital; and if insufficient, then his ratable proportion is to be repaid." 30 Cyc. 691-2 and cases cited. It appears from the case stated that with the exception of the amounts due to the members of the firm "there are no debts owing by said copartnership." It also appears that the firm is indebted to said Hall in the sum of \$26.40 for money loaned. Therefore the total indebtedness of the copartnership appears to be: \$26.40 to said Hall, the amount of capital contributed by said Hall, and the amount of capital contributed by said Smith, which must be adjusted, paid off and discharged before any division can be made, under the provisions of the seventh clause of the articles of copartnership: "After all the affairs of the copartnership are adjusted, and its debts paid off and discharged, then all the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining,

either in money, goods, wares, fixtures, debts or otherwise, shall be divided equally between the parties hereto." As the capital contributed by said Smith consisted of apparatus to be used in the business, it is manifest that it would be inequitable to return the same to him in its worn out or damaged condition, without compensation for the wear and tear or loss incident to its use by the firm. The depreciation caused by its use should be borne by the firm. Such depreciation, loss, or wear and tear constitutes a loss of capital. As was said by Gray, C. J., in *Whitcomb v. Converse*, 119 Mass. 38, 43: "Whether a loss of capital is a partnership loss, to be borne by all the parties, depends upon the nature and extent of the contract of partnership. If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. Story Part. §§ 27, 29. *Heran v. Hall*, 1 B. Mon. 159. But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot indeed be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. *Julio v. Ingalls*, 1 Allen, 41. *Bradbury v. Smith*, 21 Maine, 117. *Barfield v. Loughborough*, L. R. 8 Ch. 1. *In re Anglesea Colliery Co.* L. R. 2 Eq. 379, 387; S. C. L. R. 1 Ch. 555. *Nowell v. Nowell*, L. R. 7 Eq. 538. *In re Hodges' Distillery Co.* L. R. 6 Ch. 51, 56. 1 Lindl. Part. (3d ed.) 696, 827, 828."

"If the assets of the firm are insufficient to pay the debts, including its debts to the partners for their contributions of capital, the losses thus ascertained are to be borne by the partners in the proportion in which they are entitled to share profits, unless by the agreement of the parties, losses are to be apportioned in a different manner." 30 Cyc. 690 and cases cited. In the case stated, profits and losses were to be equally divided between the partners. Therefore in the present case to properly adjust the affairs of the copartnership, the sum of \$26.40 should first be paid to said Hall. The loss upon the capital furnished by said Smith should be ascertained and the amount thereon found to be due should be repaid to said Smith, each partner contributing one-half. If the capital contributed by said Hall has sustained a loss that should be ascertained and repaid to him by the partners, each contributing one-half part thereof. And if afterwards there remains any property or profits, enumerated in the articles of copartnership, to be divided, the same should be equally divided between said parties.

Frank M. Wilcox, for John W. Hall.

Quinn & Kernan, for Frank G. Smith.

MARGARET WELLS, *et al.* vs. HENRY KNIGHT.

JUNE 5, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Pleading. Writ in Case; Declaration in Trespass. Evidence. Blasting.*

In a writ and declaration the action was styled "an action of the case," and the declaration stated that it was the duty of the defendant "to exercise due proper and reasonable care in the control, management and operation" of his premises and in the blasting or quarrying of rock or stone and to give to travelers due proper and sufficient notice of such blasting so that they would not be injured.

The declaration alleged as to the wrongful act complained of; "that said (deceased) was in the exercise of due care and was driving a horse and wagon over said avenue and while driving as aforesaid and in the exercise of due care he was struck with a certain stone which was thrown by blasting from said ledge over said highway, which said blasting was done by said defend-

ant" etc. The declaration did not state whether or not the accident was due to negligence.

Held, that the declaration sounded in trespass, and such declaration founded on a writ sounding in case was permitted under C. P. A., § 246, so that the action was in form an action of trespass and not an action on the case for negligence, and hence evidence offered in regard to the negligence of defendant in the matter of the use of explosives was strictly inadmissible, but being offered by plaintiff, he could not on exceptions to denial of a new trial by Superior Court, after verdict for defendant, object to its effect upon the jury.

Held, further that the effect of the charge to the jury was to eliminate any consideration of the general and conflicting testimony as to defendant's negligence in preparing and operating the blast, narrowing the case down to the question of the sufficiency of the warning given by defendant and the contributory negligence of deceased.

(2) *Trespass. Blasting. Use of Premises.*

Negligence need not be shown in order to recover for damage done by matter thrown from the premises of defendant by blasting, resulting in injury or death to a person traveling on a highway.

(3) *Contributory Negligence. Blasting. Trespass.*

Contributory negligence, is a bar to recovery in cases of this character as in other cases of personal injury or death.

(4) *Trespass. Blasting. Contributory Negligence.*

Defendant engaged in blasting upon his premises, sent an employee to warn travellers on the highway, to a point sufficiently far from the blast to be a safe place to wait until after the blasting was over.

There was ample evidence to warrant the jury in believing that full and explicit warning was given deceased and it being undisputed that he was in a safe place when the warning was given and voluntarily disregarded the warning and moved forward into a place of danger when he met his death, a verdict for defendant approved by the trial judge will not be disturbed.

ACTION OF THE CASE with declaration sounding in trespass.
Heard on exceptions of plaintiff and overruled.

PARKHURST, J. This is an action of the case brought by Margaret A. Wells, of the city and county of Providence, State of Rhode Island, widow of Llewellyn Wells, late of said Providence, and Grace A., Elizabeth F. and Charles A. Wells, minor children of said Llewellyn Wells, by Margaret A. Wells, their next friend, against Henry Knight, of the town of Cranston, for damages under the statutes of the State of Rhode Island on account of the death of said Llewellyn Wells, caused by the

wrongful acts of the defendant, his servants and agents. (Gen. Laws, R. I. 1909, cap. 283, § 14.)

Llewellyn Wells on the 21st day of May, 1907, was driving on Scituate Avenue, in the town of Cranston, in a westerly direction on his way to Dugaway Hill, accompanied by James P. Ryan, of Providence. As they were driving along, when just west of Andrew McDonnell's house, which is on the north side of Scituate avenue, Mr. Wells was hit by a stone blown from a blast conducted by the defendant, Henry Knight, on the north side of Scituate avenue, about three hundred feet from the highway. Wells received injuries which rendered him unconscious and caused his death within a half an hour.

It appears that on the afternoon of May 21, 1907, the defendant had caused three holes to be drilled in a large rock, in the place aforesaid, of the depth of one and one-half feet, two feet and six feet, respectively, and the same to be charged with dynamite; that the blasts so prepared were ready to be fired between five thirty and six o'clock p. m.; that when these blasts were ready to be fired, the defendant sent Rowland R. Gardner, a man over sixty years old, employed by defendant, to the east of the ledge to notify travelers of the impending blasts, and also to inform the defendant, who had gone to the west for that purpose, when the road was clear, in order that he might give instructions to the men on the ledge when to fire the blasts.

Mr. Gardner proceeded on Scituate avenue to a point about 100 feet east of the easterly end of a stone wall, delineated on the plat on file, on the south side of Scituate Avenue, a distance of some 700 or more feet east of the blasts, at which point he signaled the defendant that it was safe to fire. The defendant then ordered the workmen on the ledge to fire; he also instantaneously shouted, "Fire, look out!" in a loud tone of voice; the men in charge of the blast also hollered "Fire, look out!" in a loud voice. This shouting was heard by two young girls on Scituate avenue about 1,000 feet east of the blasts. They also say that they informed the deceased and his companion, James P. Ryan, who were traveling in an open buggy in a west-

erly direction, of the danger ahead on the ledge; they also say that these men looked at them, and continued to drive on until they were stopped by Mr. Gardner some distance east of a gateway leading into a place on the north side of Scituate avenue, occupied at that time by Andrew McDonnell, whose deposition is in the case. When the deceased and his companion reached Mr. Gardner, the latter says that he distinctly told them that they were to stop as there were three blasts to be fired on the ledge, pointing to it, and of which the deceased at that point and for a considerable distance west of it had a clear and unobstructed view. About the time that Mr. Gardner warned the deceased of the pending blasts, one of two Italian workmen on their way home from work on a farm west of the defendant, when he had passed to the east of the McDonnell gateway, and opposite the point where Mr. Gardner stood, hearing the cries of the men on the ledge of "Fire, look out!" as he testifies, told Mr. Wells that there were five or six blasts to go off on the ledge and to look out; Mr. Gardner, knowing that there were but three, testifies that he corrected the Italian spokesman as to the number that were to be fired. Mr. Wells stopped his horse and buggy, saw the first one fired, and saw how far the stones came from it, then, disregarding all warnings as to further blasting, started to drive to the west. There was an interval between the blasts, during which the defendant and his men on the ledge again shouted, so as to be heard a considerable distance away, "Fire, look out!" Mr. Wells having started after the first blast without having been told by Mr. Gardner that it was safe to do so, the latter, seeing him driving to the west before the last blast went off, testifies that he shouted to the deceased, to hold up as there were two more blasts to go off; that the latter paid no attention to Mr. Gardner, but continued to drive on, and had traveled to a point a short distance west of the second pole west of McDonnell's house, covering about 250 or 300 feet from the point where Mr. Gardner stopped him and warned him of the blasts, when the second blast went off, throwing a piece of stone several pounds in weight, which the deceased saw as it came toward him, and which struck him on the right side of

the body, causing him to exclaim in pain, attracting the attention of the Italian who had warned him, when the latter had traveled about 300 feet from the point where he had spoken to Mr. Wells; also attracting the notice of the defendant; of Mr. McDonnell who was in a hen coop some distance north of the location of the horse and buggy; of Mr. Gardner, and of Mr. Proffitt, a colored man who lived on the south side of Scituate avenue. All of these, excepting the Italian and Mr. Proffitt, ran to the relief of the injured man, and he was taken into the defendant's house where he died within twenty minutes.

The case was tried in the Superior Court, before a jury, October 14-27, 1909, and a verdict was rendered for the defendant. The plaintiff thereupon moved for a new trial upon the following grounds: "First: The verdict is against the law. Second: The verdict is against the evidence and the weight thereof. Third: The verdict is against the law and the evidence and the weight thereof. Fourth: The damages awarded in said cause were unjust and grossly excessive. Fifth: The plaintiffs have discovered new and material evidence which they had not discovered at the time of the trial of said cause and which they could not have discovered at said time by the exercise of reasonable care." The plaintiff's motion for a new trial was denied and the case is now before this court on the plaintiffs' bill of exceptions, based on the refusal of the judge below to grant a new trial, and also upon numerous exceptions taken at the trial to the judge's rulings in admitting and excluding testimony, and in charging and refusing to charge the jury as requested.

The first question raised by the plaintiffs in argument is whether the verdict for the defendant was against the evidence and the weight thereof. In discussing this question a large part of the argument on both sides has been addressed to the question of the admissibility, pertinency and relevancy of evidence offered by the plaintiffs, to show that the defendant was negligent in the method and manner of preparing and exploding the blasts, in that he used an excessive quantity of dynamite; and that he did not properly cover the rock when the blast was

set off so as to prevent the rock and debris from flying a long distance. The defendant objected to this evidence so offered by the plaintiffs on the ground that no allegations of such negligence appeared in the declaration and the same was therefore inadmissible.

- (1) In the writ and declaration in the case at bar the action is styled "an action of the case." The amended declaration says that it was the duty of the defendant "to exercise due, proper and reasonable care in the control, management and operation" of his premises and in the blasting or quarrying of rock or stone as aforesaid and to give to travelers due, proper and sufficient notice of such blasting so that they would not be injured.

The declaration alleges as to the wrongful act complained of: "and said plaintiffs aver that said Llewellyn Wells on, to wit, said 21st day of May, A. D. 1907, at said Cranston, was in the exercise of due care, and was driving in, to wit, a southerly direction a horse and wagon or vehicle over, across and upon said Scituate avenue, in said town of Cranston, and while driving or travelling as aforesaid, and while in the exercise of due care, said Llewellyn Wells was struck in the right side, chest, arm and body with a certain stone or rock which was thrown or blown by blasting or quarrying as aforesaid, from said ledge or quarry over, across and upon said highway, which said blasting or quarrying was done by said defendant, his agents and servants," etc. This then is the statement of the case upon which the plaintiffs must recover. The declaration states just how the accident happened. It does not state whether or not it was due to negligence.

It is plainly a declaration in trespass, alleging a direct and forcible trespass to the person, without any allegation of negligence on the part of the defendant. Such a declaration in trespass, founded on a writ sounding in case, is permitted by statute, § 246 C. P. A., as construed in *Adams v. Lorraine Mfg. Co.*, 29 R. I. 333; and we regard the action in form as an action of trespass, and not as an action of trespass on the case for negligence. It follows, therefore, that as there is no allegation of negligence, and the action is founded on a direct tres-

(2) pass to the person, the evidence offered in regard to the negligence of the defendant in the matter of the use of explosives and of the covering of the blast, was under strict rules, inadmissible. Furthermore, this court has recently approved the rule set forth in *Hickey v. McCabe & Bihler*, 30 R. I., 346, 348, that "It is well settled that negligence need not be shown in order to recover for damage done by matter thrown by blasting upon the adjoining land. The rule is stated in 19 Cyc. 7, as follows: 'It may be said to be the rule that one who in blasting upon his premises casts rocks or other debris upon the land of another is liable for such invasion regardless of the degree of care or skill used in doing the work.'" (Citing numerous cases). The case proceeds to discuss the application of the same rule to cases where the damage was caused by concussions and vibrations due to blasting, noting the conflict of authority, and concludes that the same rule should apply in both classes of cases; and that proof of negligence on the part of the defendant is not necessary in cases where the damage caused by blasting results from concussions and vibrations, any more than in cases where damage results from rocks or other debris cast upon the land. It may perhaps be fair to counsel in the case at bar to say, that the case of *Hickey v. McCabe & Bihler*, *supra*, was decided by this court March 4, 1910, after the trial of the case at bar (October, 1909), so that counsel and court in the case at bar did not have the advantage of the decision in the *Hickey* case in the trial of the case at bar.

And the rule of law is the same in cases of injury to the person as in case of damage to property. *Hoffman v. Walsh*, 117 Mo. App. 278; *St. Peter v. Denison*, 58 N. Y. 416; *Munro v. Dredging, etc., Co.* 84 Cal. 515 and cases *infra*.

So the same rules are applied in case of injury or death caused to a person traveling in a highway. 2 Shearm. & Red. on Neg. § 688a; *Sullivan v. Dunham*, 161 N. Y. 290, 294, 295, 299; *Wright v. Compton*, 53 Ind. 337, 341. In the case of *Sullivan v. Dunham*, *supra* (p. 292) the court said: "The main question presented by this appeal is whether one who for a lawful purpose and without negligence or want of skill, explodes a blast

upon his own land and thereby causes a piece of wood to fall upon a person lawfully traveling on a public highway, is liable for the injury thus inflicted." And the court (after stating the cases of *Hay v. Cohoes Co.* 2 N. Y. 159 and *Tremain v. Cohoes Co.*, 2 N. Y. 163) further says (p. 294): "These were cases of trespass upon lands, while the case before us involves trespass upon the person of a human being, when she was where she had the right of protection from injury the same as if she had been walking upon her own land. As the safety of a person is more sacred than the safety of property, the cases cited here govern our decision unless they are no longer the law." Again, on p. 295, after stating the case of *St. Peter v. Denison*, 58 N. Y. 416, where a man employed upon land of another as a workman was killed by a piece of frozen earth thrown by a blast set off by defendant, the court says: "This case is analogous to the one before us, because the person injured did not own the land upon which he stood when struck, but he had a right to stand there the same as the plaintiff's intestate had a right to walk in the highway. We see no distinction in principle between the two cases." Again, at p. 299, after reviewing a number of cases, the court proceeds: "We think that the *Hay* case has always been recognized by this court as a sound and valuable authority. After standing for fifty years as the law of the state upon the subject, it should not be disturbed, and we have no inclination to disturb it. It rests upon the principle, founded in public policy, that the safety of property generally is superior in right to a particular use of a single piece of property by its owner. It renders the enjoyment of all property more secure by preventing such a use of one piece by one man as may injure all his neighbors. It makes human life safer by tending to prevent a land owner from casting, either with or without negligence, a part of his land upon the person of one who is where he had a right to be. It so applies the maxim of *sic utere tuo* as to protect person and property from direct physical violence, which, although accidental, has the same effect as if it were intentional. It lessens the hardship of placing absolute liability upon the one who causes the injury. The accident in question was a mis-

fortune to the defendants, but it was a greater misfortune to the young woman who was killed. The safety of travellers upon the public highway is more important to the state than the improvement of one piece of property, by a special method, is to its owner. As was said by the Supreme Court of Indiana in following the *Hay* case: 'The public travel must not be endangered to accommodate the private rights of individuals.' (*Wright v. Compton*, 53 Ind. 337). We think the courts below were right in holding the defendants liable as trespassers, regardless of the care they may have used in doing the work. Their action was a direct invasion of the rights of the person injured, who was lawfully in a public highway, which was a safe place until they made it otherwise by throwing into it the section of a tree."

In *Wright v. Compton*, 53 Ind. 337, at p. 341, the court said: "The act charged against them (defendants) is, in itself unlawful, not the act of blasting and quarrying rock, but the act of casting fragments of rock upon the plaintiff, to his injury. When the act, in itself, is unlawful, it is immaterial whether it is done ignorantly, negligently or purposely, except in the measure of damages.

"Every person must so use his property, and exercise his rights, as not to injure the property or restrict the rights of others.

"In this case, the defendants could not lawfully so use their stone quarry as to embarrass the rights of travelers along the public highway. The public travel must not be endangered, to accommodate the private rights of an individual."

And after stating and quoting from *Hay v. Cohoes Co.*, *supra*, the court further says: "So, we think, in this case, if the defendants cannot work their stone quarry without endangering the safety of travellers on the public highway, they must abandon it, or answer in damages for the injuries thus done."

In view of the principles laid down in the above cases, of which we approve, and in view of the frame of the declaration in trespass without allegation of negligence, we think that the evidence offered by the plaintiffs as to the negligence

of the defendant regarding use of an excessive quantity of dynamite and the covering of the blast might well have been excluded, as inadmissible and immaterial. But, in view of the fact that it was offered by the plaintiffs, they cannot now complain of its effect (if any, upon the jury); nor can the defendant complain because he has not brought the question before us upon exception; and for the further reason, that he has succeeded in obtaining a verdict.

Furthermore, the court below, after having given most of its charge to the jury, in which only a very general allusion is made to the testimony of the defendant and his experts and the testimony of the experts for the plaintiffs upon these questions of negligence, at the request of the plaintiffs' attorney, and almost at the conclusion of the charge, especially instructed the jury as follows: "The plaintiffs sustain the burden of proving negligence on the part of the defendant by showing that a rock came over from a ledge operated by the defendant and struck the deceased while he was on a public highway and the burden is on the defendant then to show that he was not guilty of negligence, under all the circumstances." It seems to us that this instruction, which was evidently drawn by the plaintiffs' attorney for the very purpose of eliminating from the case any consideration of the general and conflicting testimony as to the defendant's negligence in preparing and operating the blast, must have had that effect upon the minds of the jury; and that practically the only questions left for the jury to consider were whether the stone which killed the deceased actually came from the defendant's quarry and was thrown by the defendant's blast (as to which there was no dispute); and whether the defendant had given sufficient warning of the danger to the deceased, so that by reason of his disregard of the warning he was guilty of contributory negligence. In other words, it seems to us, that this instruction narrowed the case, so far as the question of defendant's liability was concerned down to the single question of the sufficiency of the warning given by the defendant, and the contributory negligence of the deceased.

That this was the effect of the charge is rendered the more apparent when we consider that immediately after the instruction above quoted, the following instructions (also given at the plaintiffs' request, and relating solely to the questions of due care and warning) are given as the conclusion of the charge: "Llewellyn Wells was only obliged to use such care as ordinary men having his knowledge of blasting would ordinarily use under the circumstances considering the distance of the highway, the houses, the hen-coop, the barns and sheds and all other objects from the point of blasting.

"The deceased might reasonably have anticipated that a stone from the blast would not go farther than common experience shows that it is apt to go." And the court finally concludes, in his own language, as follows: "Of course if there was no warning that it was dangerous to proceed along the highway, the deceased had a right to go ahead, believing that a stone wouldn't come over upon the highway, unless he was expressly warned to that effect. It is for you to say what the warning was and whether or not it was sufficient."

- (4) We come then to the question of contributory negligence. A careful consideration of the testimony convinces us that upon this ground the jury was justified in finding a verdict for the defendant. It is undisputed that the defendant sent his employee, Mr. Gardner, expressly for the purpose of warning travelers upon the highway, to a point sufficiently far from the blast to be a safe place to wait till after the blasting was over; and that Gardner did warn the deceased and his companion Ryan at that point to stop, because of the danger. And although there is some conflict as to whether Mr. Gardner told the deceased and Ryan that there was to be more than one blast, there was ample evidence to corroborate Mr. Gardner's statement that he expressly said to them that three blasts were to be fired; and there is ample evidence that there were warnings given by the men on the ledge and others in the hearing of the deceased and Ryan, and heard by others much farther away than the deceased, that there were other blasts to follow the one already fired, while the deceased was waiting in his buggy

at the place where he was first stopped by Gardner; a number of witnesses, eight or more, testify in various ways and to various facts and circumstances regarding the warnings, some directly corroborating Gardner's statement as to his direct warning of three blasts to be fired, others as to the warnings given by the men at the ledge. As there was ample evidence to warrant the jury in believing that full and explicit warning of the danger was given to the deceased, and it is undisputed that he was in a safe place when the warning was given, and voluntarily disregarded the warning and moved forward into a place of danger when he met his death, and as the judge who has tried the case has approved the verdict of the jury, we find no ground for setting the verdict aside. (*Wilcox v. R. I. Co.* 29 R. I. 292.)

- (3) It is not disputed, in this case, as we understand, that contributory negligence, if proved, is as much a bar to recovery, in cases of this character, as in other cases of personal injury or death. *Wright v. Compton*, 53 Ind. 337; *Sullivan v. Dunham*, 10 App. Div. (N. Y.) 438; 19 Cyc. p. 10. Shearm. & Red. Vol. 2, p. 1188-1190; Am. & Eng. Ency. Laws, 2nd. Ed. vol. 12, p. 510; *Smith v. Day*, 86 Fed. Rep. 62; *Wadsworth v. Marshall*, 88 Me. 263; *Cary Bros & Hannon v. Morrison*, 129 Fed. R. 177.

The ground of newly discovered evidence claimed in the plaintiffs' motion for a new trial is not supported by any sufficient affidavits and is not pressed.

The exceptions based upon the denial of the plaintiffs' motion for a new trial on the ground that the verdict was against the law and against the evidence and the weight thereof, (being Plaintiffs' Exceptions Nos. 46-50 inclusive) for reasons above and hereinafter set forth are overruled.

As to the plaintiffs' other specific exceptions (numbered 1-45 inclusive), we find that counsel rely only upon those numbered 1-3 and 6-17 inclusive, and 25-45 inclusive; and that exceptions numbered 4, 5, and 18-24 inclusive are abandoned. All of the exceptions urged and relied upon, Nos. 1-17, relate to rulings admitting or refusing to admit testimony, or to

remarks of defendant's attorney in relation to questions asked. We do not find in any of these exceptions anything worthy of extended comment. We find that most of the questions ruled out, were quite immaterial; that defendant's attorney said nothing which could in any way have prompted the witness or prejudiced the jury in favor of the defendant; and the plaintiffs' attorney was allowed in each instance to get from the witness all of the material testimony which the witness was capable of giving. Exceptions Nos. 1-24 relating to the admission and exclusion of testimony are therefore overruled.

As to the plaintiffs' exceptions Nos. 25-45 inclusive, Nos. 25-34 inclusive relate to error claimed to have been made by the court in giving instructions to the jury as requested by defendant's attorney. A careful consideration of the instructions so given, in connection with the evidence in the case, and as modified by the court, shows that they were all fully warranted by the evidence; that they all related to the question of the warning given by the defendant to the deceased, and the question of the due care required of the deceased under the circumstances, and to the effect of want of due care on the part of the deceased as to the right of his widow and children to recover in this case; we find no error in the instructions as modified by the court, and that the same were correct; and we find that a review of them at length is unnecessary and would unduly lengthen the opinion. Exceptions Nos. 25-34 inclusive are therefore overruled.

Exceptions Nos. 35-45, inclusive, relate to the refusal of the court to charge as specially requested by the plaintiffs' attorney. Some of the instructions requested had already been covered by the charge as given; some of them were clearly irrelevant and untenable, and would have been error, if given as requested; we find no error in the refusals. These exceptions are therefore overruled.

The plaintiffs' exceptions are all overruled and the case is remitted to the Superior Court with direction to enter its judgment for the defendant upon the verdict as rendered by the jury.

Waterman, Curran & Hunt, for plaintiffs.

Cooney & Cahill, for defendant.

TOWN OF WARWICK vs. JOSEPH BARBER.*

JUNE 8, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Town Council. Salaries Limited by Vote of Financial Town Meeting.*

Defendants were elected as a town council, and at a financial town meeting subsequent to their qualification it was voted "that the annual salary of each member of the town council shall be fifty dollars, which sum shall be his full compensation for all services performed by him as a member of the town council, or on any committee thereof, or for any services performed by him for the town in any capacity during the term for which he is elected."

Held, that following *Quinn v. Barber*, 31 R. I. 538, the vote constituted a limitation upon any appropriation for the payment of the salaries during the year and the town treasurer could not exceed such limitation, and the town was entitled to recover any excess of such salary paid to the members.

ASSUMPSIT. Heard on exceptions of defendants and overruled.

BLODGETT, J. These are seven actions of assumpsit against the seven members of the town council of Warwick for the year 1908-9, which are tried together by consent of parties and in each of which it is sought to recover the sum of \$150 with interest which sum it is claimed was illegally paid to each of said defendants in excess of his lawful salary for said year. In the Superior Court jury trial was waived and after decision by the trial justice in favor of the plaintiff in each case, the defendants have excepted to said decision in each case, and, inasmuch as the same questions arise in each case, they have been argued together before this court.

The testimony shows that the defendants Barber, Holden, Lemoine, Long, Place, Smith and Taber were severally elected as members of said town council on November 3, 1908, and severally qualified November 9, 1908. It is also undisputed that at an adjourned financial town meeting of said town, held on December 18, 1908, the following vote was passed: "Voted:

* Six other actions were tried with this against defendants, George J. Holden, Louis Lemoine, Samuel H. Long, Adelbert E. Place, William M. Smith, Amasa P. Taber.

—That the annual salary of each member of the Town Council shall be fifty dollars, which sum shall be his full compensation for all services performed by him as a member of the Town Council, or on any committee thereof, or for any services performed by him for the Town in any capacity during the term for which he is elected.

“No member of the Town Council shall have any pecuniary interest, directly or indirectly, in any contract entered into by the Town Council, or by the Town through any of its agents, while he is a member of the Council.

“Any contract entered into in violation of the provisions of this vote shall be void; and the town treasurer shall make no payments thereon, and no councilman, during his term of service as such councilman, shall be employed by any other department of this town, or receive any emolument other than the salary provided in this resolution.”

The testimony of the town treasurer, Herbert W. Barber, as to the payments for salary to said defendants for said year is as follows: “I see, yes, sir. February 8th, 1909, fifty dollars, to seven members. May 10th, 1909, fifty dollars to seven members. August 10th, 1909, fifty dollars to seven members. October 25th, 1909, fifty dollars to seven members.” He apparently justifies his action by reference to the provision of a vote passed at the annual financial meeting the previous year, viz., on November 19, 1907, and which is as follows: “The annual salary of the Town Councilmen is hereby fixed at \$200.00 per annum, which sum shall be in full for all services as councilmen, or as councilmanic committees and said councilmen are hereby prohibited from drawing any money, directly or indirectly, from this Town for any services, teams, or material furnished, or performed in connection with the highway work of the Town; and the treasurer is hereby enjoined from making any such payments.”

- (1) This court in *Quinn v. Barber*, 31 R. I. 538, at p. 544, in referring to the vote passed on December 18, 1908, decided as follows: “In our opinion, however, the vote above quoted fixing the amount of compensation to be paid to each member

of the town council for his services during the year for which he was elected, constitutes a limitation upon any appropriation for the payment of the salaries of Town Officers during said year. The intention of the financial town meeting to limit the amount that should be paid to any member of the town council is clear, and the payment to any member of any sum in excess thereof is what is sought by the bill to be enjoined. The appropriation for payment for the services of each member of the town council being thus limited, the town treasurer can not exceed such limitation."

This is decisive of the case at bar and the defendants' said exceptions are severally overruled and the cases are severally remitted to the Superior Court for the County of Kent with direction to enter judgment for the plaintiff in each case upon the decision heretofore rendered.

Quinn & Kernan, Joseph McDonald, for plaintiff.

John F. Murphy, Samuel W. K. Allen, for defendant.

NELSON ST. JOHN vs. RHODE ISLAND COMPANY.

JUNE 9, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Negligence. Pleading. Collision. Incompetent Servants.*

In an action for negligence arising out of a collision between the wagon of plaintiff and one of defendant's cars the declaration charged as the sole breach of duty, the hiring of incompetent servants to operate the car. It appeared in evidence that plaintiff suddenly attempted to cross the track in front of the car, without notice or warning, at so short a distance as to make it impossible to stop the car, without collision; that plaintiff being in a covered wagon could not testify as to the cause of the accident, nor was any witness called on this point by him:—

Held, that the evidence neither supported the allegation of the declaration nor showed negligence on the part of defendant.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and overruled.

BLODGETT, J. After a verdict by direction of the court in favor of the defendant in this action on the case for negligence, in which action the plaintiff sought to recover damages for injuries alleged to have been received by reason of a collision between a car of the defendant corporation and the wagon which the plaintiff was driving, the plaintiff has brought the case to this court upon his exception to such direction of a verdict.

The declaration contains but one count and charges the alleged negligence of the defendant, as follows: "That the defendant was guilty of negligence in his duty in these premises toward the plaintiff, in this, in hiring careless, inattentive and incompetent agents and servants to operate said car while it was being run on said road-bed in said public highway."

In granting the defendant's motion for the direction of a verdict the trial justice correctly stated the evidence and the law applicable thereto, as follows: "Now it is the duty of the plaintiff, in order that he may recover a verdict at your hands, to prove to you by fair preponderance of testimony that at the time this accident happened he was in the exercise of due care, and that the accident happened through the negligence of the defendant's agents and servants.

"Proof was submitted by him that the accident happened, but there is no evidence submitted by him to show that it happened through the carelessness and negligence of the defendant's servants. The explanation of the accident comes entirely from the witnesses for the defense; and there is no evidence submitted by the plaintiff that those servants were negligent, or not careful servants, none submitted whatever. And there is no evidence submitted to show that even though the servants were incompetent or careless that the defendant company knew anything about it.

"If a man alleges a particular breach of duty and rests his case on that particular breach of duty, he must prove that and no other, and, as I say, there is no evidence tending to show that those servants were careless or incompetent, or that the company knew that they were employing careless or incom-

petent servants. Besides that, gentlemen, the explanation of this accident comes entirely from the defendant's witnesses, and that shows no negligence, apparently, on the part of the defendant. Under those circumstances, I say it is the duty of the plaintiff to prove to you that he was in the exercise of due care, and that the accident happened through the negligence, and negligence alone, of the defendant's agents and servants. There is no evidence of negligence on their part and I, therefore, direct you to find a verdict for the defendant."

- (1) It so clearly appears by the record that the plaintiff while driving by the side of the defendant's car-track suddenly attempted to cross the car track in front of said car, bringing his horse to a walk in so doing, without notice or warning to the motorman or conductor, and at so short a distance (ten feet) in front of the car as to make it impossible to stop the car without a collision with the wagon, that an extended comment upon the testimony is unnecessary. The testimony of the plaintiff shows that the car was stopped with the front of the car opposite the rear wheel of the wagon and the plaintiff being in a covered wagon is unable to testify as to the cause of the accident nor is any witness called on this point in his behalf. The evidence shows no negligence on the part of the defendant in the operation of the car and clearly does not support the allegation of having incompetent servants, as alleged in the declaration.

The plaintiff's exception is overruled, and the case is remitted to the Superior Court for the entry of judgment on the verdict.

W. Waldo Robinson, for plaintiff.

Joseph C. Sweeney, Alonzo R. Williams, for defendant.

JOHN W. PECK vs. THE RHODE ISLAND COMPANY.

JUNE 13, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Driving in Car Track. Ordinary Care. Contributory Negligence in Law.* Plaintiff, who was driving in the car track in the evening, claimed that he

knew nothing of the existence of the track, owing to fog or of the approach of the car until he saw its head light too late to avoid the accident. It also appeared in evidence that there were lights along the road which must have lighted the track sufficiently to have attracted the attention of an ordinarily careful man. Plaintiff admitted that he drove over the same road in the morning, but did not observe the track:—

Held, that upon the principle that plaintiff saw what he might have seen if he had looked, it would be assumed that he had knowledge of the existence of the track.

Held, further, that plaintiff not being required to leave the ordinarily travelled part of the road, but choosing to drive along the track, was required to exercise the degree of care commensurate with the danger to be apprehended.

Held, further, that plaintiff was guilty of contributory negligence as matter of law.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and overruled.

DUBOIS, C. J. This is an action of trespass on the case for negligence, brought in the Superior Court for damages resulting from the head-on collision of an electric car of the defendant company with the horse and wagon of the plaintiff, in the evening of October 31st, 1905, on Pawtucket avenue, in the town of East Providence. The negligence complained of was that the defendant operated its car at an immoderate rate of speed and also neglected to give warning of its approach by sounding its gong. The plaintiff, who was driving his horse at the time of the accident, testified, at the jury trial of the case in the Superior Court, that it was foggy at the time and that although he was driving in the car track he did not know of its existence and knew nothing of the approach of the car until its headlight appeared one hundred and twenty-five to one hundred and thirty feet away when he attempted to turn out of the way, but was unable to do so in time to avoid being struck. He also testified that he drove over the same road in the morning of that day but did not observe that there was any car track thereon. At the conclusion of the testimony the justice presiding at the trial, in the following language directed the jury to return a verdict for the defendant: "The plaintiff drove along this very road in Pawtucket in the morning, in

broad daylight, and must have known that the car track was on the highway, although he says he didn't. It is almost inconceivable that a man could drive along a road with an electric car track on the road in plain sight and not know. On his way home he says it was dark and he drove along the right hand side upon this track, in such a condition that, as he says, he couldn't see a car, with a fog there—although persons at the railroad crossing, several hundred feet further from the car than he was, looked right by him some seven or eight hundred, or a thousand feet, and could see the headlight in this car. He says he was utterly oblivious of the fact that the car track was there. He says he was paying attention in order to avoid colliding with some other vehicle, disregarding the car track entirely, wasn't looking for any car or light or any sound.

"Now the law is that a person traveling upon the railroad track must pay some attention to his own safety, must look ahead for a light, look and listen for the sound of the bell. The circumstances are quite different from what it would have been if the car had run up to him, maybe from behind; on a track like that he could see that car with this headlight more easily than the motorman could see him without any light, on his team.

"Gentlemen, I consider this a case of contributory negligence, the plaintiff was paying no attention whatever, as he says himself, was entirely oblivious to the fact that the car was there, wasn't looking for a light or listening for a bell or any sound on that car until the car got so close to him that the motorman wasn't able to check the speed of the car; hence the collision occurred.

"If you should render a verdict for the plaintiff in this case, I should consider it my duty to set it aside; therefore you may return a verdict now for the defendant."

To this ruling the plaintiff excepted, and the case is now before this court for consideration upon the plaintiff's bill of exceptions upon the grounds that the verdict is against the law and the evidence.

- (1) We are unable to perceive any error in this direction of the court. As was said by this court, speaking through Mr. Justice Rogers, in *Beerman v. Union R. R. Co.*, 24 R. I. 275, 279: "A railroad track, whether steam or electric, is a place of danger, and a person crossing it, whether on foot or in a vehicle, must exercise ordinary care for his own safety to exonerate him from the charge of contributory negligence, and what is ordinary care under one set of circumstances might amount to negligence under a different set of circumstances. Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute ordinary care, the absence of which is negligence. It is a question of degree only. The kind of care is precisely the same. *Young v. Citizens St. R. R. Co.* 148 Ind. 54, 58; *Prue v. N. Y., P. & B. R. R. Co.*, 18 R. I. 360, 369." A person who chooses to drive upon and along a railroad track simply for his own convenience and not because of any condition of the road or the use of the same by the vehicles thereon that requires him to leave the ordinarily traveled part thereof acquires no right of way by so doing that is superior to that of the railroad company owning such track. He must constantly bear in mind that it is a place of danger and be prepared to exercise diligence to prevent collision with cars thereon. As to his claim that he did not see the track and did not know that it was there, this cannot avail him as an excuse for as was said in *Cones v. Cincinnati, etc. Ry. Co.*, 114 Ind. 328, 330: "The law will assume that he actually saw what he could have seen, if he had looked, and heard what he could have heard, if he had listened."

The law, therefore, assumes that he had knowledge of the existence of the track. In addition, it appeared in evidence that there were incandescent electric street lights at intervals along the road which must have lighted the track sufficiently to attract the attention of an ordinarily careful and prudent man. In these circumstances the court was justified in directing the jury to return a verdict for the defendant; as we said

in *Nicholas v. Peck*, 20 R. I. 533, "Though ordinarily the question of contributory negligence is for the jury, we think the plaintiff's negligence is sufficiently clear for the court to hold that he was negligent as a matter of law.

The plaintiff's exceptions are therefore overruled and the case is remitted to the Superior Court, with direction to enter judgment on the verdict.

John P. Beagan, for plaintiff.

Joseph C. Sweeney, Alonzo R. Williams, for defendant.

STATE vs. CHARLES PAPA.

JUNE 12, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *New Trial. Full, Fair, and Impartial Trial.*

In a motion for a new trial filed under Gen. Laws, 1909, cap. 298, § 12, in the Superior Court, claims that petitioner did not have a fair and impartial trial, because of the instruction of the court to the jury and because the court permitted the attorney general to make certain statements to the jury, are inappropriate in such a motion, since "error of law occurring at the trial," is expressly excluded from the reasons for which a new trial may be granted under said section, the exclusive remedy in a case where a trial has not been full, fair, and impartial being by a petition to the Supreme Court for a new trial under Gen. Laws, 1909, cap. 297, § 2.

(2) *Indictment. Dangerous Weapon. Proof.*

Where an indictment charges an assault with a dangerous weapon, proof of the dangerous character of the wounds inflicted by means of the knife in the hands of the defendant, is sufficient without proof establishing the size or character of the knife.

(3) *Verdict Against Law.*

Where it is not shown that the jury disregarded the law as given them by the court, it is to be assumed that the verdict is in accordance with the instructions given.

(4) *New Trial. Errors of Law.*

Where there is nothing in the evidence to indicate that the jury were not warranted in arriving at the conclusion which they did, a motion for a new trial is properly denied by the justice of the Superior Court, who is not permitted to pass upon his own errors of law, if any there be.

(5) *Right of Counsel to Interview Witness under Summons.*

The statement of the presiding justice to the jury that "it is unfortunate that the defendant's attorney should feel under any obligation to send for one

of the witnesses for the State." "That is an unfortunate circumstance, to say the least. The State's witnesses should be left alone by the defendant," is error prejudicial to the rights of the defendant.

Witnesses are not parties and may be summoned by either side of a controversy, and counsel not only have the right, but owe the duty to clients to interview witnesses of an occurrence in their investigation of the case, although such witnesses may be under summons at the time.

(6) *Prima Facie Evidence of Guilt. Prejudicial Error. New Trial.*

While evidence of the flight of a defendant subsequent to the commission of an offence, is a circumstance which the jury is entitled to consider as an indication of the consciousness of guilt on his part, it is the province of the jury to determine the weight of this species of evidence, and an instruction to the jury that such fact of flight by the defendant made a *prima facie* case indicating guilt on his part, is prejudicial error.

INDICTMENT charging an assault with a dangerous weapon. Heard on exceptions of defendant, and certain exceptions sustained.

DUBOIS, C. J. The defendant was indicted for an assault with a dangerous weapon, to wit, a knife. The case was tried in the Superior Court and resulted in a verdict of guilty with recommendation of mercy. The defendant filed his motion for a new trial, which motion was heard and denied by the justice of the Superior Court who presided at said trial. The case is now before this court for the consideration of the defendant's exceptions, the truth of which was established by us upon his petition brought for that purpose, viz.: The exception taken to the refusal of the Superior Court to grant the defendant's motion for a new trial, and the following exceptions, numbered by the defendant I, II, III, IV, and V, in his bill of exceptions, to wit:

"I. To that part of the charge of the Justice presiding at the trial of said cause which stated that the attorney for the defendant knew at the time of the interview with the witness John Malone that he had been summoned in behalf of the State, on the ground that the evidence shows that the boy was summoned by the State on Monday night; on the ground that the attorney for the defendant notified the defendant in this case on Monday night to bring the boy to his office on Tuesday morning and that there is nothing in the evidence to show that the attorney for the defendant knew at the time

that the interview was held in his office that the boy was under summons by the State. Transcript, page 181.

"II. To that part of the charge of the Justice presiding at the trial of said cause which suggests that the fleeing of the defendant under the circumstances in this case is *prima facie* evidence of his guilt. Transcript, page 182.

"III. To that part of the charge of the Justice presiding at the trial of said cause which suggests that the evidence which the attorney for the defendant gave to the effect that he was notified by the defendant that John Malone was a witness in this case is susceptible of the construction which His Honor has put upon it, that said attorney for the defendant knew that said witness had been summoned by the State as a witness in this case. Transcript, page 184.

"IV. To that part of the charge of the Justice presiding at the trial of said cause as set forth in the following language:—
'No, If your Honor please I will take now an exception to Your Honor's last statement that I knew he was to be a witness on the ground there is no testimony in this case that I knew he was to be a witness, that my testimony was that he was a witness. He was a witness in the sense he was a witness of the affair, not that he was to be a witness summoned either by himself or the State. And, further, there is nothing in the testimony upon which may be predicated the charge of Your Honor that I knew of his being summoned by the State, because there is testimony in the record that an arrangement was made by me that he was to appear at my office whereby to come to this Court at nine o'clock Wednesday morning, an arrangement entered into on Tuesday morning when he was to come to my office.'

"V. To the sustaining by the Justice presiding at the trial of said cause of the objection of the Assistant Attorney General for the State to the thirteenth question of counsel for the defendant asked the defendant as shown on page 149 of the transcript."

The defendant's motion for a new trial reads as follows:
"And now comes the respondent in the above entitled cause within seven days after verdict therein and moves that a new

trial be granted him and for grounds of said motion, upon which said grounds he hereby declares he relies, he says:

"I. That said respondent did not have a fair and impartial trial in that the prosecuting attorney notwithstanding the objection of said respondent was allowed by the justice presiding at the trial of said cause to state to the jury that it was improper for the respondent by his attorney to interview, confer or have any intercourse with a witness summoned by the State relative to the testimony to be offered by said witness at said trial to the manifest prejudice of said respondent before said jury.

"II. That said respondent did not have a fair and impartial trial in that the Justice presiding at the trial of said cause instructed the jury that the State's witnesses had been approached by the respondent by his attorney to learn what they were to testify to and that the State's witnesses should be left alone by the defendant and should not be approached by him to learn what they are to testify to, to the manifest prejudice of said respondent before said jury.

"III. That the record in this cause shows a variance between the indictment and the proof in that the indictment charges assault with a dangerous weapon while there is no proof that establishes the size or character of the pocket knife in the hands of the respondent as a dangerous weapon.

"IV. That said verdict is against the law.

"V. That said verdict is against the law and the evidence and the weight thereof.

"Wherefore the said respondent moves that a new trial be granted him."

The motion for a new trial was filed under the provisions of Gen. Laws, 1909, cap. 298, § 12, which provides: "Within seven days after verdict any person or party entitled to except in a cause or proceeding tried by a jury in the Superior Court may file in the office of the clerk of said court a motion for a new trial for any reason for which a new trial is usually granted at common law, other than error of law occurring at the trial. Such motion shall state the grounds relied upon in its support. The court, after hearing the parties, may set aside the verdict

- and order a new trial, with or without terms. A verdict shall not be set aside as excessive by the supreme or superior court until the prevailing party has been given opportunity to remit so much thereof as the court adjudges excessive." It will be noticed that "error of law occurring at the trial," is excluded from the reasons for which a new trial may be granted upon such a motion. Also the claim made by the defendant in the first and second grounds of his motion, that he did not have a fair and impartial trial of the case in the Superior Court, are inappropriate in such a motion. If the defendant did not have a fair and impartial trial for the reasons given in the motion it was on account of error of law occurring at the trial.
- (1)

Moreover, another remedy is provided by Gen. Laws, 1909, cap. 297, § 2, in the following terms: "A party or garnishee in any action or proceeding in the Superior Court in which a trial has been had which was not full, fair, and impartial, may at any time within one year after verdict or decision petition the supreme court for a new trial; and the supreme court may, with or without terms, order a new trial in the superior court." This remedy is exclusive and therefore there is no necessity for further consideration of the first and second grounds of said motion.

- (2) The third ground thereof is also untenable, there was ample proof of the dangerous character of the wounds inflicted by means of the knife in the hands of the respondent. There could hardly be a fairer test than that, which speaks of results rather than theories or speculations, of facts instead of opinions.
- (3) As to the fourth ground, the defendant has not suggested, and we fail to find, wherein the jury disregarded the law as it was given to them by the justice of the Superior Court who presided at the trial, therefore it is to be assumed that the verdict is in accordance with the instructions given.

Concerning the fifth, and last ground, that the verdict was against the evidence. At the trial, the defendant admitted the commission of the assault with a knife, his subsequent flight, and his plea of guilty to a similar charge in the district court, but he claimed that what he did was done in defending

himself from an unprovoked assault made upon him and begun by the prosecutor. In this condition of the evidence it was the duty of the jury to ascertain the truth if possible, and there is nothing in the transcript of testimony to indicate that the jury were not warranted in arriving at the conclusion which they did. The motion for a new trial was therefore properly denied by the justice of the Superior Court, who is not permitted by the statute to pass upon his own errors of law, if any there be. If

(4) the presiding justice at the trial did err in permitting the prosecuting attorney, against the objection of the respondent, to make improper and prejudicial remarks to the jury, it was the duty of the respondent to take exception to the ruling of the court complained of in order that the same might be brought to the attention of this court in an orderly manner. So far as we are able to ascertain from an inspection of the transcript no such exception was taken and the matters contained in the first ground of the motion for a new trial are not now before us.

- (5) We pass now to the consideration of the exceptions that were taken. The first exception has relation to the following portion of the charge of the justice, presiding, to the jury: "The State has also brought this little boy in here, John Malone, if that is his name. You have heard his statement here and you have heard what occurred in Mr. Sullivan's office. I will say, Gentlemen, in regard to that matter, it is unfortunate that the defendant's attorney should feel under any obligation to send for one of the witnesses for the State, who has been summoned by the State and that he knows has been summoned by the State, and summon him to his office and there tell him what the defendant has said were the facts of the case and ask him if that is not true, and have the boy say it is true; then tell the boy he must come or he should come into court and tell the story in that way. That is an unfortunate circumstance, to say the least. The State's witnesses should be left alone by the defendant, they should not be approached by the defendant with any object of influencing their testimony in any way. You have heard the boy's story here as to just what occurred in Mr. Sullivan's office, and you have heard Mr. Sullivan's

story, and you have heard the story of the others who claim to have been present, and who have given their version of that affair. You will determine what the facts are for yourself." We are of the opinion that this portion of the charge contains error prejudicial to the rights of the defendant. The attorney for the defendant not only had the right, but it was his plain duty towards his client, to fully investigate the case and to interview and examine as many as possible of the eye-witnesses to the assault in question, together with any other persons who might be able to assist him in ascertaining the truth concerning the event in controversy. Witnesses are not parties and should not be partisans; they do not belong to either side of the controversy; they may be summoned by one or the other or both, but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous. Such a proceeding in a criminal case would violate the provisions of the Constitution of this State, Article I, section 10, which provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land." The defendant, therefore, has the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf, he has also the right either personally or by attorney to ascertain what their testimony will be. But in the interviews with and examination of witnesses, out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses. If in any case the claim should be made that a

party has misconducted himself in this respect the matter should be left to the determination of the jury as affecting the question of his guilt or innocence of the crime charged. If it was charged that an attorney had been guilty of such impropriety, it would constitute cause for the disciplinary action of the court and should not be submitted to the jury unless it appeared that it was done with the knowledge and consent of his client in which case the matter should be left to the determination of the jury. The court, however, should refrain from the use of expressions which are likely to give the jury the impression that the court has prejudged the matter. The expressions of the court in this case, above quoted, beginning "it is unfortunate that the defendant's attorney should feel under any obligation to send for one of the witnesses for the State," and ending: "That is an unfortunate circumstance to say the least," are subject to this criticism. This exception must, therefore, be sustained.

- (6) The second exception is taken to the following charge of the trial court: "Now, there was some other evidence here. There has been one or two Italian women who have told what they know about the matter; but among other things the defendant himself has been upon the stand, and he says that he did knock this man down, struck him with his fists, and that he did do the cutting, and he says that immediately after the party who claims to have been assaulted was struck by his fist and was cut, that he fled, that he went to his house, got his cap, took his bicycle and left his home and left the State of Rhode Island, and was gone until about the time of his arrest, when he returned, some twenty days or so after the occurrence. I will say to you, Gentlemen, that the very fact that the defendant, under those circumstances which he has related here, saw fit to flee from the State, makes a *prima facie* case which indicates guilt on his part." And later, in the course of his charge to the jury, the judge added the following remarks on the same subject: "and that he at that time, as soon as the affray between him and Aramino was over, he immediately left as he has told you here. . But, Gentlemen, as I have

already called to your attention, the very fact that he ran away is a circumstance which indicates guilt if not explained by him to your satisfaction." There is no question but that evidence of the conduct of the defendant subsequent to the commission of an offence is always admissible; hence evidence of his flight is competent on the question of his guilt. It is a circumstance which the jury are entitled to consider as an indication of the consciousness of guilt on the part of the defendant. It is a proverb that "The wicked flee when no man pursueth; but the righteous are bold as a lion." However, it is the province of the jury to determine the weight of this species of evidence. In the case of *State v. Beswick*, 13 R. I. 211, this court held that an act of the legislature making certain recited circumstances *prima facie* evidence against an accused, was unconstitutional and void, in depriving the accused of the protection of the common law principle that every person is to be presumed innocent until he is proved guilty, as recognized in the Constitution of R. I. Art. I, § 14, and in violating the provision that an accused shall not "be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land." *Ibid*, Art. I, § 10. The court has no more power in the premises than the legislature, and the instructions given in regard to flight of the accused are subject to the same criticism. For these reasons the exception is sustained.

The third and fourth exceptions are also sustained for the reasons given for sustaining the first exception.

The fifth exception relates to a ruling of the court sustaining the State's objection to the following question put by counsel for the defendant to him: "Q. 13. Are you a married man or a single man?" The court properly held it to be immaterial and unimportant and the exception is without merit, and is therefore overruled.

As certain of the defendant's exceptions have been sustained, as aforesaid, the case is remitted to the Superior Court for a new trial.

William B. Greenough, Attorney-General, Harry P. Cross, Second Assistant Attorney-General, for State.

Edward M. Sullivan, Francis E. Sullivan, for defendant.

STATE vs. ROBERT GAINES.

JUNE 12, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Criminal Law. Policy Lottery. Complaints.*

Upon a complaint charging defendant with knowingly having in his possession a certain bill, slip, certificate, token and other device and article such as is used in carrying on, promoting and playing the game commonly known as policy lottery and policy, evidence showing that defendant had in his possession a slip of paper which was the record of the drawing of that day in the game of policy, which record was necessary in promoting the game, and that defendant when asked about the drawing of that day had, in response produced the slip, was sufficient to establish the allegations of the complaint.

(2) *Evidence.*

In a criminal complaint charging defendant with knowingly having in his possession a "policy slip," a witness for the State was properly asked if he knew from his experience and knowledge what a certain slip of paper shown to him, was.

(3) *Evidence.*

In a criminal complaint charging defendant with knowingly having in his possession a "policy slip," a witness who had testified that he had played the game for years was asked: "For what purpose are those policy slips shown by the writer to the player? A. Because lots of people play policy and like to see the drawing, even though they don't play today, they like to see the drawing. Q. And to whom are such slips delivered? A. To the writer."—

Held, admissible and relevant.

(4) *Evidence.*

In a criminal complaint charging defendant with knowingly having in his possession a "policy slip," evidence of a conversation between a police officer and defendant was introduced, wherein defendant was asked where he got the policy slip, and gave his explanation of how it came into his possession, and thereafter he was asked to read the slip, and he did so:—

Held, that the evidence was admissible since the fact that he read the slip showed that defendant had knowledge of its significance and purpose.

(5) *Evidence. Policy Lottery.*

In a criminal complaint charging defendant with knowingly having in his possession a "policy slip," "Q. What if anything did defendant say to

you about that slip? A. He said it was a policy slip. Q. And you asked him what those numbers on the top meant and he told you it meant September 13th, drawing one? A. Yes," was admissible as showing that defendant knew the slip was a policy slip.

(6) *Policy Lottery. Constitutional Law.*

Chapter 376 of the Public Laws passed at the January session, 1909, in amendment of and addition to Chapter 283 of the Gen. Laws, 1909, of lotteries, policy-lotteries, etc., is not obnoxious to the provisions of Cons. R. I. Article I, sections 6, 10, and 14.

CRIMINAL complaint. Heard on exceptions of defendant, and overruled.

BLODGETT, J. The defendant has been found guilty by the verdict of a jury in the Superior Court of the charge contained in the following complaint, viz.: "That at said Providence, in said county on the 13th day of September, A. D. 1909, with force and arms, Robert Gaines alias John Doe, of said Providence, laborer, Did knowingly have in his possession a certain bill, slip, certificate, token and other device and article such as is used in carrying on, promoting and playing the game commonly known as policy lottery and policy, against the Statute and the peace and dignity of the State."

The case is before this court upon the defendant's exceptions to the denial of a motion for a new trial and also upon his exceptions to the admission and rejection of evidence at the trial. The statute under which the complaint was preferred is Pub. Laws, cap. 376, passed March 16, 1909, and is as follows: "An Act in amendment of and in addition to Chapter 283 of the General Laws, entitled 'Of Offences against Public Policy.'

It is enacted by the General Assembly as follows:

"SECTION 1. Section 28 of Chapter 283 of the General Laws of Rhode Island is hereby amended to read as follows:

"SEC. 28. Whoever keeps, sets up, promotes, or is concerned as owner, agent, clerk, or in any other manner, in managing any policy-lottery or policy-shop, or writes, prints, sells, transfers, or delivers any ticket, certificate, slip, bill, token, or

other device purporting or designed to guarantee or assure to any person, or to entitle any person to a chance of drawing or obtaining any prize or thing of value to be drawn in any lottery or in the game or device commonly known as policy-lottery, or policy; or for himself or another person writes, prints, sells, or transfers or delivers, or has in his possession for the purpose of sale, transfer, or delivery, or in any way aids in selling, exchanging, negotiating, transferring, or delivering, a chance or ticket in any lottery, or in the game or device commonly known as policy-lottery or policy, or any such bill, slip, certificate, token, or other device, or who sells or offers to sell what are commonly called lottery-policies, or who indorses a book or other document, for the purpose of enabling others to sell or offer to sell lottery-policies, or who shall receive, register, record, forward, or purport or pretend to forward, or undertake to forward, or receive and agree to forward, to or for a lottery, or to or for any particular lottery, or to any person, within or without this state, any money, thing, or consideration of value, to purchase an interest or share in any lottery, or to obtain or secure for any person what is commonly called a lottery-policy, or a chance of drawing or obtaining any prize or thing of value to be drawn in any lottery, or in the game or device commonly called policy-lottery, or policy, or who shall receive or offer to receive any money, thing, or consideration of value to be forwarded to or for a lottery, or to or for any particular lottery, or to any person to invest in a lottery, within or without this state, whether the same actually exists or not, or whether any drawing of the same, or any act to allot any prize or thing of value, takes place or not, or whether there be any such person or not, or whoever shall have in his possession, knowingly, any bill, slip, certificate, token, or other device, or article of any kind such as is used in carrying on, promoting, or playing the game commonly known as policy-lottery or policy, shall, upon conviction, be punished by fine not exceeding five hundred dollars or imprisonment not exceeding one year, and upon a second conviction of a violation of this section shall be imprisoned for a period not less than one nor more than five years."

- (1) The defendant's first exception is as follows: "That the Court erred in denying the defendant's motion for a new trial which was based upon the ground that the verdict was contrary to the evidence and the weight thereof; that the evidence did not establish the guilt of the defendant beyond a reasonable doubt; that the verdict was against the law." As to so much of said exception as relates to the sufficiency of the evidence, the decision of the trial justice in denying the motion for a new trial on that ground is unquestionably correct, and is as follows: "The evidence shows that on the afternoon of the 13th of September, 1909, the defendant had in his possession a certain slip of paper marked at the top, as follows: '9, 13, 1,' and underneath two columns of figures containing 12 figures each; that such slip of paper was the record of the drawing in the game of policy lottery of the morning of that day, and that this record is necessary in promoting the game, as it enables the persons who play to ascertain whether or not they have won or lost. The evidence also shows that at the request of one witness for the State, who said to the defendant, 'Is anything doing? I want to see the morning drawing,' the defendant produced the slip in question.

"These facts were not contradicted. From the evidence in the record it is apparent that the defendant knowingly had in his possession this slip and that said slip is a 'certain bill, slip, certificate, token and other device such as is used in carrying on, *promoting* and playing the game commonly known as policy-lottery and policy.'

"It is the opinion of the Court, therefore, that the allegations of the complaint are established beyond a reasonable doubt by the proofs, and that the verdict of the jury was justified.

"Motion for a new trial denied."

- (2) The defendant's second exception is as follows: "That the Court erred in admitting the 'slip' in evidence over the defendant's objection taken to question 34, found on page 9 of the transcript of the evidence."

The slip in question was as follows:

"9—13—1

24	78
69	43
54	21
27	44
66	40
2	71
47	5
12	24
35	59
50	32
70	63
26	52"

The question referred to was to the witness Bowen and was as follows: "Now do you know from your experience and knowledge what that slip is?" The question was whether the witness knew what the slip was, and was entirely proper. The succeeding question and answer gave the basis of his knowledge. "Q. 35. What do you say that slip is? A. It is a policy slip, in my opinion. Q. 36. How do you know that? A. Well, I have received it from a man that has been playing the game, and I asked him for it, and he returned it to me as one, and it is similar to the ones that I have got in the district as being policy slips." The exception is without merit.

The defendant's third exception, to the testimony of the witness Johnson, is as follows: "That the Court erred in admitting question 13 and answer thereto, found on page 37 of said transcript of the evidence." (p. 37). "Q. 13. What is it? Objected to by Mr. Beagan. THE COURT: Answer the question. He has played the game. Mr. Beagan's exception noted. A. It is a policy slip." This exception is also without merit for the same reason.

- (3) The defendant's fourth exception was to the testimony of the witness Johnson, who had already testified that he had played the game for many years. "Q. For what purpose are

those policy slips shown by the writer to the player? A. Well, they are given to him because lots of people play policy and they like to see the drawing, even though they don't play today, they like to see the drawing." The testimony was clearly admissible and relevant and the defendant takes nothing by his said exception.

The defendant's fifth exception is as follows, and was directed to the testimony of the same witness, Johnson: "That the Court erred in admitting the following question and answer: (p. 70) "Q. And to whom are such slips delivered? A. To the writer." To understand the relation of the question objected to it is proper to state also the question which preceded it and certain questions which follow: (p. 69) "Q. 253. I will ask you one more question: If it has been covered, I don't care to press it. What part in the game of policy do these slips play, similar to the State's Exhibit A.? Mr. BEAGAN: That has been covered. THE COURT: It indicated what numbers had come out in the morning drawing, he said. Q. 254. And to whom are such slips delivered? Mr. BEAGAN: They might give them to persons entitled to them and they might not. They might give them deliberately or inadvertently. THE COURT: He is accused of knowingly having this slip. Mr. BEAGAN: This man is not accused of having played the game, and if they saw fit to charge him with that, the statute was broad enough to have included a charge of that kind. THE COURT: He is charged with knowingly having this slip in his possession. You may answer the question. Mr. BEAGAN: I am going to suggest another objection, and that is the fact it is apparent from this man's own testimony that he is not an expert, has no expert knowledge of what was done in September of this present year; that the conditions he was familiar with were conditions which prevailed before the first of January, this year, and he knows nothing by actual experience. THE COURT: I think I can take judicial knowledge of the fact that he had. The very next section but one provides that the Court will take judicial knowledge of the general character. Mr. BEAGAN: If the State sees fit to ask an expert

witness if he can tell it, and he can not, why, the State cannot go beyond that witness' knowledge. THE COURT: Ask the question. Mr. Beagan's exception noted. Q. 255. And to whom are such slips delivered? A. To the writer. Q. 256. What does the writer do with them? A. Distributes them among the customers. Q. 257. Among his customers? A. Yes, sir. Q. 258. And by customers you mean players? A. Yes, sir." This testimony was also clearly admissible and relevant and the fifth exception is overruled.

- (4) The defendant's sixth exception was to the admission of a conversation between the witness Lawrence, a police captain, and the defendant, and was as follows: "That the Court erred in admitting the question 23 and answer thereto, found on page 77 of said transcript of the evidence." (p. 77) "Now, will you tell what the conversation was? MR. BEAGAN: I object on the ground that you cannot prove an offence by admissions; that the *corpus delicti* must be established independent of any admissions or statements. He cannot give conversations until there is an independent establishment of the offence; he cannot give the admissions to establish guilt. THE COURT: They have produced testimony to prove exactly that, to prove that this man had this in his possession. Mr. Beagan's exception noted. Question read to the witness. A. Mr. Bowen handed me this policy slip and said that he took it from—— THE COURT: Leave that out. I ruled that out yesterday. Q. Tell the conversation you had with Gaines? A. I asked Gaines, 'What! Are you writing policy again?' He says, 'No.' I says, 'Where did you get this policy slip' He says, 'I got it from a man on Weybosset Street.' I says to him, 'Who was the man?' He said he didn't know his name. I asked him was he colored or white, and he said he was white. I says, 'Now, you had this in your possession, and I presume that you were showing this to this man that you stopped on the street when Officer Brown approached you.' He says, 'No, this was given me by a man on Weybosset Street.' I said, 'Did you have anything to do with that policy at all? You don't write it?' He says, 'No.' I says, 'I advise you not to

have any more of those slips or have anything to do with policy afterwards.' He was arrested in this complaint. I made complaint, and he was arrested on the warrant a few days later, and he had in his possession at that time—— Objected to by Mr. Beagan. THE COURT: We are trying him on this case now. Q. 25. Was there any further conversation at that time Captain? Objected to by Mr. Beagan. Q. 26. Any further conversation between you and Gaines at that time. Mr. BEAGAN: It was apparent that the Captain was going to run into something else. He is an experienced man in court. THE COURT: This is the conversation on the 13th of September, 1909, in the police station. A. I asked Mr. Gaines while there to read this policy slip. I had seen some similar to this. He said, or he called it off, 9th month, 13th day, and the first drawing. We had quite a little conversation on policy, and with that, I let him go." The ultimate answer given by the witness Lawrence shows that the question was clearly admissible and that the defendant had knowledge of the significance and purpose of the slip in question.

- (5) The defendant's seventh exception is as follows, to the testimony of Captain Lawrence: (p. 83) "Q. 38. What if anything did the defendant say to you about that slip? A. He said it was a policy slip, Mr. Gaines did. Q. 39. And I understood you to testify that you asked him what those numbers on the top meant, and he told you it meant September 13th, drawing one? A. Yes, sir. Mr. BEAGAN: I move to strike out the statement of the witness in which he designated this as a policy slip. THE COURT: In what part—the answer to next to the last question? I deny the motion. It may stand for what it is worth. Mr. Beagan's exception noted." The evidence was clearly admissible as showing that the defendant knew that the slip in question was a policy slip and the defendant's seventh exception is overruled.

The defendant's eighth exception was as follows: "That the Court erred in refusing to direct the jury to return a verdict of not guilty as requested on page 86 and 87 of said transcript of the evidence." (p. 87) "Mr. BEAGAN: The evidence is very

unsatisfactory as indicating knowledge on the part of this defendant as to what that was. THE COURT: I think there is sufficient evidence to go to this jury that this slip is used in carrying on and promoting the game. The motion to direct a verdict is denied." The trial justice was clearly right, and this exception is overruled.

The ninth exception does not appear to be urged upon the defendant's brief.

- (6) The tenth exception is as follows: "That Chapter 376 of the public laws passed at the January Session of 1909 being an act in amendment of and in addition to Chapter 283 of the General Laws, entitled 'Of Offences against Public Policy,' is unconstitutional and void and repugnant to Sections 6, 10, and 14 of Article 1 of the Constitution of the State of Rhode Island and Providence Plantations, the constitutionality of said act being brought in question in said case and the decision thereof reserved, as found on page 86 of said transcript of the evidence." The sections of the constitution therein referred to are as follows:

"SEC. 6. The right of the people to be secure in their persons, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing, as nearly as may be, the place to be searched, and the persons or things to be seized." . . .

"SEC. 10. In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land." . . .

"SEC. 14. Every man being presumed innocent, until he is

pronounced guilty by the law, no act of severity which is not necessary to secure an accused person shall be permitted."

We see no violation of any of the foregoing provisions in the record before us. The guilt of the accused did not rest upon any presumption, but the significance and purpose of the slip were established by direct testimony, as was also the fact that the accused knew of such significance and purpose when he had the slip in his possession; and against the testimony for the State he offered no evidence.

Defendant's exceptions overruled, and case remitted to the Superior Court for sentence.

William B. Greenough, Attorney-General, Harry P. Cross, Second Assistant Attorney General, for State.

John P. Beagan, for defendant.

DESIRE CHABOT vs. JOSEPH A. PAULHUS.

JUNE 13, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ

(1) *Minors. Contracts. Rescission. Intoxicating Liquors. Sale to Unlicensed Minor.*

In an action of assumpsit brought by a minor to recover back the purchase price of a liquor saloon and its contents, it appeared that after six weeks he made a formal tender of the saloon and contents and key accompanied by a written rescission of the contract:—

Held, that the sale was not within the rule contended for by defendant, that a minor could bind himself by a contract beneficial to him, inasmuch as a minor is disqualified by law from obtaining the license required for engaging in the liquor business.

Held, further, that in thus selling liquors to a minor, defendant committed an illegal and criminal act.

Held, further, that as under the provisions of Gen. Laws, cap. 123, §§ 7, 60, and 61, an unlicensed adult would be entitled to recover so much of the purchase money as represented the price of the liquors sold, so much the more would an unlicensed minor be entitled to recover under similar circumstances, and therefore the objection of defendant that the liquors returned were not equal in value to those sold, was untenable, even if defendant were otherwise entitled to be placed *in statu quo*.

(2) *Minors. Misstatement of Age. Contracts.*

A minor is not prevented from disaffirming a contract and upon return of what he received, suing for the purchase price, because of a misstatement of his age, inasmuch as such a misstatement would not give him the capacity to contract.

ASSUMPSIT. Heard on exceptions of defendant and overruled.

BLODGETT, J. This is an action of assumpsit brought by a minor, through his next friend, to recover back four hundred dollars which the infant plaintiff paid to the defendant on June 13, 1908, as the purchase price of a liquor saloon and its contents. After the lapse of a month and a half he offered the premises back to the defendant, and on July 31, 1908, a formal tender of the saloon and contents and the key of the saloon was made by the delivery to the defendant by the plaintiff and a constable of the following signed written communication:

"FISKEVILLE, R. I., July 31, 1908.

MR. JOSEPH A. PAULHUS,

SIR:—In the matter of the contract entered into by me with you under date of thirteenth day of June, A. D. 1908, for the purchase by me of your saloon, including fixtures and the stock in trade, as set forth in a certain bill of sale signed by you on said thirteenth day of June, A. D. 1908, for the sum of four hundred dollars, which said sum was paid you by me, I hereby notify you by reason of the fact that I was, at the time of making said contract, not of age, I hereby rescind said contract and tender you the key to said saloon and the saloon itself and its contents, as set forth in the bill of sale hereinbefore referred to, and make formal demand upon you for the return of the money which was paid you by me in pursuance of said contract, viz:, four hundred dollars."

The plaintiff has had nothing to do with the saloon since.

It was admitted by the defendant at the trial in the Superior Court that the plaintiff was a minor, both at the time of the sale and at the time of the alleged tender and disaffirmance thereof.

The defendant contended at the trial that the plaintiff had misrepresented his age to the defendant when he entered into the agreement with him, and that the plaintiff had not returned, or offered to return, four dollars which the defendant paid him for rent of a room over the saloon. At the conclusion of the testimony the trial justice directed the jury to return a verdict for the plaintiff for \$400.

- (1) The defendant has presented a bill of exceptions to this court alleging as his sole exception that the court erred in directing the verdict for the plaintiff.

The defendant relies on the expression of this court in *Pardey v. American Ship Windlass Co.*, 20 R. I. 149, as follows: "For, though it is true generally that a minor cannot bind himself by his contracts, for want of legal capacity, it is equally well settled that he may bind himself by a contract for necessities, if reasonable, or by a contract beneficial to him," and claims that inasmuch as the business was a profitable one financially the plaintiff cannot disaffirm the sale. But the sale of a liquor saloon to a minor is not even within the rule for which he contends, being neither necessary nor beneficial to the minor inasmuch as he is disqualified by law from obtaining the license required for engaging in the liquor business. Moreover, the defendant overlooks the fact that in thus selling liquors to a minor he commits an illegal and criminal act, punishable by statute by both fine and imprisonment, as well as forfeits his own license and renders his bondsman liable on his bond as well as renders himself ineligible for a license for the term of five years. Cap. 543, Pub. Laws, passed April 29, 1898.

Moreover, were the defendant now suing the plaintiff for the value of said liquors, in addition to the defence of minority, he would be confronted with the provisions of sections 60 and 61 of Chapter 102, General Laws, 1896, which has been re-enacted as sections 60 and 61 of Chapter 123, General Laws, 1909, as follows: "Sec. 60. All payments or compensation for liquors sold in violation of law, whether in money, labor or personal property, shall be held and considered, as between the parties

to such sale, to have been received in violation of law, without consideration and against equity and good conscience." "Sec. 61. No action of any kind shall be had or maintained in any court of this state for the value of any intoxicating liquor drunk upon the premises of the seller or for the possession or value of any liquors held, purchased or sold contrary to the provisions of this chapter." And section 7, Chapter 102, General Laws, 1896, now section 7, Chapter 123, General Laws, 1909, provides, as follows: "No person holding a license under the provisions of this chapter shall sell any of the liquors enumerated in this chapter to any unlicensed dealer in intoxicating liquors, nor to any owner or keeper of any house of ill-fame, having reason to believe that the same are to be resold; and every person holding a license found guilty of violating the provisions of this section shall be fined one hundred dollars and imprisoned thirty days, and shall thereby be disqualified for holding a license of any kind under the provisions of this chapter for a period of five years." And see *McGuinness v. Bligh*, 11 R. I. 94 and *Gorman v. Keough*, 22 R. I. 47.

If the foregoing considerations would be sufficient to entitle an unlicensed adult proposing to conduct a liquor business to recover so much of the purchase money as represents the price of the liquors sold, an unlicensed minor is *a fortiori*, entitled to a recovery under similar circumstances. And this, without more, disposes of the objection raised by the defendant that the liquors returned were not equal in value to those sold, even if the defendant were otherwise entitled to be placed *in statu quo ante*.

As to the furniture, fixtures and other paraphernalia of the saloon, no question is made, but that the identical goods sold were offered to be returned undamaged. And it is conceded that the money paid for rent by the defendant was paid by the plaintiff to the landlord.

- (2) There can be no possible question as to the right of a minor, thus returning what he has received, to maintain his action for the purchase price thereof upon a disaffirmance of his contract, even if he originally misstated his age, a fact which

is denied by him, and is by no means clearly established by the proof, inasmuch as even a misstatement of his age would not give him the capacity to contract which is an incident only of majority in fact.

The defendant's exception is overruled, and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Felix Hebert, for plaintiff.

Quinn & Kernan, for defendant.

STATE vs. FRANK E. BATTEY.

JUNE 13, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Waiver of Jury Trial in Criminal Proceedings.*

The Superior Court has no jurisdiction to try a criminal appeal without a jury, although jury trial is expressly waived by a respondent.

CRIMINAL APPEAL. Heard on exceptions of defendant and proceeding in Superior Court held to be null and void for reasons stated in opinion.

DUBOIS, C. J. This is a criminal complaint brought in the District Court of the Fifth Judicial District, under Gen. Laws, 1909, cap. 86, § 11, charging that on July 10, 1910, at Bristol, the defendant "Did wilfully and unlawfully operate and cause to be operated a motor vehicle, to wit, an automobile, on a public highway, in said town of Bristol, to wit, Hope Street, beginning at a point on said highway, at or near the residence of Mrs. Raymond Paull, thence along said highway in a southerly direction, the territory contiguous thereto being closely built up, at a rate of speed greater than fifteen miles per hour, against the statute and peace and dignity of the state." In the district court the defendant pleaded guilty, was sentenced, and took an appeal to the Superior Court. In the Superior Court

the defendant pleaded not guilty and waived jury trial, and the case was heard and decided by a justice of said court without a jury. In the course of said trial the defendant took certain exceptions to the rulings of said justice and duly filed and prosecuted the same, and the case is now before this court for the consideration of said exceptions. But we are confronted with a question affecting the jurisdiction of the Superior Court in the premises which must be disposed of at the outset. Did the Superior Court have jurisdiction to hear this criminal appeal without a jury even though the defendant had waived his right of trial by jury?

"As a general rule defendant cannot waive a jury trial in a criminal prosecution, or at least in prosecutions where a jury is an essential part of the court having jurisdiction to try the offense charged; but the authorities show a radical difference of opinion by the different courts as to the grounds upon which the rule is based. A few of the decisions are based in whole or in part upon grounds of public policy, and others were decided under constitutional provisions which were in terms mandatory; but most of the constitutions merely provide that the accused shall enjoy the right to a jury trial, and most of the decisions seem to be based not upon the question of whether the constitutional provisions may be waived, but upon the ground that the court is without jurisdiction, which cannot be conferred by consent, to proceed without a jury in the absence of statutory authority, or where the statutes expressly provide that the trial shall be conducted according to the course of the common law, or that issues of fact must be submitted to a jury. Accordingly it is uniformly held that where the legislature so provides a jury trial may be waived and the case tried by the court, and under such provisions expressly authorizing a trial by the court, no distinction as to the right of waiver is made between prosecutions for felonies and for lesser offenses.

"In some cases it is held that the rule that a jury trial cannot be waived in criminal cases applies to trials for misdemeanors as well as felonies, but in others it is held that in trials for misdemeanors a jury trial may be waived. In a few states there

(1) is a distinction based upon statutory provisions which in terms permit a waiver in the case of misdemeanors or in trials before justices or in certain courts of inferior jurisdiction." 24 Cyc. 150 and cases cited. Although in this State, under the Constitution, Art. 1, § 15: "The right of trial by jury shall remain inviolate," it may be expressly waived or lost by non-claimer thereof in civil cases. But it is not so in criminal appeals; on the contrary there is a direct prohibition, for under Gen. Laws, 1909, cap. 296, § 9, it is provided that: "All criminal appeals shall be heard and tried in the Superior Court with a jury." This is a mandatory provision which cannot be waived. The Superior Court has no jurisdiction to try a criminal appeal without a jury, and a motion in arrest of judgment might well be interposed in any case where the statute had been violated in this particular. And in case of imprisonment upon a mittimus, a writ of habeas corpus would lie for the enlargement of the person so detained.

For these reasons the proceedings had in the Superior Court after waiver of jury trial therein were null and void and resulted in a mistrial of the case, and therefore the case must be remitted to the Superior Court for further proceedings.

William B. Greenough, Attorney-General, Harry P. Cross, Second Assistant Attorney-General, for State.

Mumford, Huddy & Emerson, George H. Huddy, Jr., for defendant.

STATE vs. HAMPARSOOM KARAGAVOORIAN.

JUNE 14, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Separation Agreement No Bar to Criminal Prosecution for Neglect to Provide.*

An agreement of separation between husband and wife, which has been fully complied with by the husband, and in which the wife agrees that she will release the husband from all claims for support, is not a bar to a criminal prosecution by the State against the husband charging neglect to provide

according to his means for the support of his wife under Gen. Laws, 1909, cap. 347, § 39.

(2) *Obligation of Support of Wife Cannot be Contracted Away.*

The legal obligation of the husband to support the wife according to his means or ability is an inseparable incident of the relation of husband and wife, which cannot be contracted away in such manner as to release the husband from liability to criminal prosecution at the instance of the State.

(3) *Certification of Question of Doubt or Importance to Supreme Court.*

Gen. Laws, 1909, cap. 298, § 5, provides that "If in any proceeding civil or criminal, in the Superior Court or in any District Court, prior to the trial thereof on its merits any question of law shall arise which in the opinion of the court is of such doubt and importance and so affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, the court in which the cause is pending may certify such question to the Supreme Court for that purpose:—

Held, that, the statute excluded doubtful questions which were not important, as well as important questions which were not doubtful, and both classes of questions unless they so affected the merits of the controversy as to require the decision of this court, and all such elements must be first found to exist by the court before which the cause was pending.

Speculative and moot questions are not to be so certified under a *pro forma* ruling because of an agreement of counsel.

Quære; Whether the words "prior to the trial thereof on the merits" refer to the Superior Court, when there has been a previous trial in the District Court on the merits.

(4) *Criminal Law. Pleading. "Special Plea in Bar." "Not Guilty." Certification of Question of Doubt to Supreme Court.*

In a criminal complaint against a husband charging neglect to provide according to his means for the support of his wife, defendant filed a "special plea in bar" setting up an agreement of separation between himself and his wife by which the wife agreed to release him from all claims for her support, etc.:—

Held, that proper practice in criminal pleading required a plea of "not guilty."

Held, further, that as matter of law the facts stated in the plea did not release defendant from criminal prosecution on the above charge, and as evidence must be offered to show the actual facts as to each of the parties, the plea in itself without more was worthless in determining the guilt or innocence of defendant and hence the question certified was of that class which the statute did not contemplate should be sent to the supreme court, since the negative answer of the court settled nothing material to the determination of the case.

CRIMINAL COMPLAINT. Heard on question of doubt certified to court under Gen. Laws, 1909, cap. 298, § 5.

BLODGETT, J. It is charged in this complaint by the Deputy Chief of Police of the city of Providence, that the respondent

on January 4, 1910 at Providence, "did neglect to provide according to his means for the support of his wife," and the statute under which the complaint is preferred is Gen. Laws, 1909, cap. 347, § 39, as follows: "Every person who shall abandon his wife or children, leaving them in danger of becoming a public charge, or who shall neglect to provide according to his means for the support of his wife or children, or who, being an habitual drunkard, shall neglect or refuse to aid in the support of his family, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than six months nor more than three years in the state workhouse and house of correction or not more than one year in the county jail in the county where he shall have been convicted, and the jurisdiction to try and sentence offenders under this section is conferred upon district courts."

The respondent has pleaded specially in bar thereto, as follows:

"DEFENDANT'S SPECIAL PLEA IN BAR.

"Now comes said defendant, Hamparsoom Karagavoorian, and by leave of court first had and obtained says that said complaint ought not to be further prosecuted against him, the said defendant, because he says that on the to-wit day of October, A. D. 1908, the said defendant and his wife, Sultan Karagavoorian, made and entered into an agreement in the words and language following:

" 'STATE OF RHODE ISLAND,

" 'PROVIDENCE, SC.

" 'Articles of Separation entered into this twenty-eighth day of October in the year of our Lord One Thousand Nine Hundred and Eight by and between Hamparsoom Karagavoorian of the City and County of Providence in the State of Rhode Island and Sultan Karagavoorian, wife of said Hamparsoom Karagavoorian of said City, County and State, WITNESSETH:

" 'Whereas, certain unhappy and irreconcilable differences have arisen by and between the parties to these articles of

separation by reason of which an incompatibility of temper and affection have arisen, making it inconvenient and mutually disagreeable to live together as husband and wife, and resulting in a cessation of affection, confidence and esteem which should govern and control the marital relations, it is mutually agreed:

“ ‘First, that said Hamparsoom Karagavoorian and Sultan Karagavoorian shall live separate and apart from each other, having no communication or intercourse with each other, thereby enabling them or either of them to be absolutely free and independent from each other.

“ ‘Second: that said Hamparsoom Karagavoorian and Sultan Karagavoorian do mutually agree not to communicate, interfere, molest or in any way embarrass the other in the free exercise of the rights and privileges tolerated by the laws, usages and customs of the State of Rhode Island.

“ ‘Third: that said Sultan Karagavoorian agrees and by these presents does acknowledge the receipt of the sum of Seven Hundred (700) Dollars, lawful money of the United States of America and in consideration of the payment of said sum of Seven Hundred (700) Dollars, she does hereby solemnly promise and agree that she will in no way demand, call upon or request from the said Hamparsoom Karagavoorian any additional money or article of value or property of any kind or description either for her support, maintenance, shelter, food, raiment or for any other purpose whatsoever, meaning and intending thereby to absolutely release and surrender unto the said Hamparsoom Karagavoorian all and any rights and and privileges whether at law or in equity be the same subject to the laws of the Sultan of Turkey, the United States of America or the State of Rhode Island, which the said Hamparsoom Karagavoorian owes to the said Sultan Karagavoorian, as husband, from the beginning of the world to the end of time.

“ ‘In witness whereof, we have hereunto subscribed our names and affixed our seals to these articles of separation on this Twenty-eighth day of October in the year of our Lord

One Thousand Nine Hundred and Eight, at Providence, Rhode Island.

“ ‘(Signed) HAMPARSOOM KARAGAVOORIAN (L. S.)
her

“ ‘(Signed) SULTAN KARAGAVOORIAN (L. S.)

“ ‘Witnesses:

“ ‘(Signed) PARSEK ROOPER,

“ ‘(Signed) MARDIROS M. STONE.

“ ‘STATE OF RHODE ISLAND,

“ ‘PROVIDENCE, SC.

“ ‘Subscribed and sworn to before me this Twenty-eighth day of October, A. D. 1908, at Providence, Rhode Island.

“ ‘(Signed) STEPHEN J. CASEY,

“ ‘*Notary Public.*’

“And the defendant avers that he paid to said Sultan Karagavoorian, wife of said defendant, as aforesaid, on said to-wit 28th day of October, 1908, said sum of Seven Hundred Dollars (\$700) and is therefore, under and by virtue of and in accordance with the terms of said agreement, under no liability whatsoever for the support of his said wife, Sultan Karagavoorian; and this he is ready to verify.

“Wherefore he prays judgment and that by the Court here he may be dismissed and discharged from the said premises in said complaint specified.

HAMPARSOOM KARAGAVOORIAN,

By his Attorneys,

STEPHEN J. CASEY,

WM. J. BROWN.”

- (1) The State has demurred to this plea and the following question of doubt and importance has been certified to this court by the Superior Court, under the provisions of cap. 298, § 5, Gen. Laws, 1909: “Is an agreement of separation between husband and wife, the provisions of which have been fully complied with by the husband, in which the wife promises and agrees ‘that she will in no way demand, call upon or request from’ (her husband) ‘any additional money or article of value

or property of any kind or description either for her support, maintenance, shelter, food, raiment or for any other purpose whatsoever, meaning and intending thereby to absolutely release and surrender unto'..(her said husband)..'all and any rights and privileges whether at law or in equity' (owed to her by her said husband) 'from the beginning of the world to the end of time,' a bar to a criminal prosecution brought by the proper authorities against said husband, charging neglect to provide according to his means for the support of his wife, brought under Chapter 347, section 39, of the General Laws of Rhode Island, 1909?"

The provisions of Gen. Laws, R. I. cap. 298, § 5, are as follows: "If in any proceeding, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, any question of law shall arise which in the opinion of the court is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, or if a motion in arrest of judgment be made, the court in which the cause is pending may certify such question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined."

The question submitted must be answered in the negative. In discussing the divorce case of *Ditson v. Ditson*, 4 R. I. 87, Ames, C. J., observes, concerning marriage (p. 101): "In strictness though formed by contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it resembles in this, that it is formed *by* contract."

The counsel for the respondent cites authorities from other jurisdictions which sustain the contention that agreements of separation may be entered into between husband and wife

which may preclude the wife from maintaining any action for further support and maintenance. But this complaint is preferred on behalf of the State at the instance of the Deputy Chief of Police of Providence for the punishment of one who has violated the penal laws of the State, and not by the wife for her further support. Nor do the cases cited on the respondent's brief sustain his contention. Thus *Bailey v. Dillon*, 186 Mass. 244, was a case where, after an agreement of separation performed as to the payments required thereunder by the husband, the wife was enjoined from proceeding with her petition to the Probate Court for further support. It was not a criminal prosecution under the provisions of Chapter 212, section 45 of the Revised Laws of Massachusetts which punishes one who "unreasonably neglects to provide for the support of his wife," by fine or imprisonment, but was preferred to the Probate Court, as a civil action, by the wife, under the provisions of section 33 of Chapter 153 of the Revised Laws of Massachusetts, which provides that such court may make orders for the support of the wife as occasion may require. *Galusha v. Galusha*, 116 N. Y. 635, was an action for divorce, on the ground of the husband's adultery, in which the wife sought to recover as alimony a sum other than that specified in the articles of separation and she was not allowed to do so, although the divorce was granted. In *Commonwealth v. Richards*, 131 Pa. St. 209, the wife sought an order for additional support under circumstances not dissimilar to those set forth in *Bailey v. Dillon*, *supra*, and the court observed (p. 219): "The proceedings are not under the act of 1836, but under the act of 1867; they are instituted by the wife, not by the children or by the overseers of the poor." . . . "If the prosecution were in behalf of the children, or by the overseers of the poor, a question would be presented which it is not necessary now to discuss." In *State v. Weber*, 48 Mo. App. 500, the Court stated the ground of its decision, discharging the accused, as follows (p. 504): "The state failed to show that Weber abandoned his wife in this state." In *Crittenden v. Schermerhorn*, 39 Mich. 661, there had been an allowance for alimony, and, in the syllabus of the

case it is thus stated: "A creditor for necessities furnished to the wife can only sue the husband in her right, and can be in no better position to complain of him than she is," and the creditor was not allowed a recovery.

Galusha v. Galusha, *supra*, cited by the defendant, well illustrates the distinction claimed by the state. Although the parties had executed articles of separation and substantially all the objects and purposes of marriage were no longer prosecuted by the parties, nevertheless, the wife was held not precluded thereby from obtaining a divorce on the ground of the adultery of the husband; and it is equally clear that such an agreement would be no bar to a criminal prosecution for the same offence.

- In the case at bar it is clear that a like result must follow. If the respondent should be found guilty and fined, no portion of that fine would go to the wife but all of it would go to the state. The wife is not enriched thereby, nor has she obtained from the husband anything which she released to him in the
- (2) agreement aforesaid. But the legal obligation of the husband to support the wife according to his means or ability is an inseparable incident of the relation of husband and wife, which cannot be contracted away in such manner as to release the husband from liability to criminal prosecution at the instance of the State, any more than by any agreement between husband and wife, either can be released from criminal liability for the commission of adultery, although either one may condone the offence and thus be precluded from maintaining a civil action for divorce.

We have, with much hesitation, thus answered the question certified, not hesitating because of the nature of the reply which should be made to it, but because of the way in which it has been presented.

- (3) The provisions of the statute above quoted require several elements to concur before a question can be certified to this court. (1) The question must be one of doubt. (2) It must be a question of importance. (3) It must so affect the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, and (4) all these

elements must be so determined to exist by the court before which the cause is pending. This obviously excludes doubtful questions which are not important, as well as important questions which are not doubtful, and both classes of questions unless they so affect the merits of the controversy as to require decision by this court. This excludes also the sending of questions here which may possess all three of these attributes in the opinion of counsel, unless it is the deliberate opinion of the court that the questions contain the elements above set forth, and it equally authorizes the court to send such questions here even though counsel do not consider it necessary so to do. Speculative and moot questions are not to be sent to this court under a *pro forma* ruling because of an agreement of counsel; but only questions which, as above stated, so affect the merits of the controversy in the opinion of the court as to make a decision of them necessary.

- The record in the case at bar affords the occasion for certain observations. When the cause was before the District Court, a special plea, substantially similar to the one now under consideration was filed, and the prosecution moved that it be stricken out inasmuch as all the matters contained in it were properly admissible as defence under the plea of "Not Guilty."
- (4) The District Court properly granted the motion and struck out the plea and the case was heard on its merits on the plea of "Not Guilty." After having been adjudged guilty in the District Court the respondent appealed to the Superior Court and filed what he calls his "Special Plea in Bar," now under consideration. He points us to no statute which authorizes such a plea in a criminal case, and, even if we assume that the words in the statute "prior to the trial thereof on the merits" are to be held to refer to the Superior Court and not to the District Court where there was a trial on the merits, such a plea is no more proper in this case than would be a plea that the respondent was unmarried, or was divorced. Proper practice in criminal pleading would require a plea of not guilty, and under that plea he could show that he was not married or had been divorced, or such other defence as he may be advised to make.

Indeed, a plea that he was unmarried or had been divorced would be a plea in bar if admissible under the rule of practice in criminal pleading, while the plea under consideration is not. It is indeed matter for consideration that the respondent paid his wife \$700 on October 28, 1908, but we cannot say, as matter of law, that such a payment releases him from criminal prosecution for "neglect to *provide according to his means* for the support of his wife" on January 4, 1910. It may be that he has been unable through illness or lack of employment or other causes to make further provision for her, and he may have been abundantly able to provide for her. On the other hand, the wife may have the entire \$700 still in her possession or it may have been stolen from her or she may have lost it the day she received it, or she may have spent it all for the necessities of life. It is evident that evidence must be offered to show the actual facts as to each of the parties and that the plea as a plea in bar without more is worthless in determining the guilt or innocence of the accused and hence the question certified is of that class of questions which the statute does not contemplate should be sent to this court, inasmuch as our negative answer to it settles nothing material to a determination of the case.

The papers in the case will be transmitted to the Superior Court with the decision of this court certified thereon for further proceedings.

William B. Greenough, Attorney-General, Harry P. Cross, Second Assistant Attorney-General, for State.

Stephen J. Casey, William J. Brown, for defendant.

HARRIET L. READ *et al.* vs. MATILDA GARDNER, Ex'x.

JUNE 15, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Probate Law. Trial of Probate Appeal while another Appeal Pending.*

While two appeals were pending from decrees of a probate court, one being for the sale of real estate, and the other for an allowance of an account of an

executrix, and the first appeal having reached the Supreme Court on exceptions, the second came on for trial and appellants moved that it be taken from the jury on the ground that the appeal being tried in the body of the former appeal, the verdict might be inconsistent with the opinion of the Supreme Court in the first appeal:—

Held, properly denied.

PROBATE APPEAL. Heard on appellant's exceptions and overruled.

BLODGETT, J. This is an appeal by Harriet L. Read and Bradford Campbell from a decree of the Municipal Court of the City of Providence allowing, as amended, the first account of Matilda Gardner as executrix of the will of Rebecca Campbell, late of Providence, deceased.

At the trial of said appeal in the Superior Court counsel for the appellants made a motion that the case be taken from the jury and passed, on the following grounds: That this appeal was one of two appeals then pending from decrees of the Municipal Court, the first decree being for the sale of real estate, and the second, for an allowance of the first account of the executrix; that the appeal in the first of said decrees was then pending in the Supreme Court upon exceptions, after a verdict for the appellee; that the present appeal was tried in the body of said former appeal wherein testimony was introduced as to the account, which is the matter involved in the present appeal; that if the present appeal should proceed to trial before the jury, the verdict rendered therein might be inconsistent with the decision of the Supreme Court in the former appeal, and thus lead to confusion.

The motion was denied and an exception was taken. The appellants thereupon declined to offer evidence or to participate in the trial. They then filed their bill of exceptions, the only exception contained therein being as follows: "The appellants excepted to a ruling of said justice at the trial of said appeal, (1) denying appellant's motion that said appeal be taken from the jury as shown on page 4, Transcript of Testimony, &c., filed in said Court."

In the former case between the same parties involving the

correctness of the proceedings relative to the decree authorizing the sale of said real estate, reported in 30 R. I. 485, this court held as follows: (p. 487) "We see no error in the action of the Superior Court in proceeding with the trial of this appeal while the other appeal was pending; nor do we see error in the admission in evidence of the account of the executrix as allowed by said municipal court, certainly for the purpose of showing what personalty had come to her hands and what payments therefrom she had made, and which were not questioned. It was part of the case of the executrix to show these things and thus enable the Superior Court to be convinced that other claims, not therein included, would render the personal estate insufficient to pay them and thus justify and require the sale of real estate."

That case is decisive of the case at bar. The appellants take nothing by their exception to the ruling of the trial justice refusing to take the case from the jury and to pass the trial of it, and, inasmuch as they offered no evidence to contradict the correctness of the evidence offered by the appellee in support of the allowance of the amended account, the trial justice properly directed a verdict for the appellee.

Appellants' exception overruled, and case remitted to the Superior Court with direction to enter its decree upon the verdict.

Thomas A. Carroll, Walter P. Suesman, for appellants.

Irving Champlin, James Harris, for appellee.

DOMENICO PETTINE vs. THE RHODE ISLAND COMPANY.

JUNE 16, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Common Carriers. Negligence. Collision. Contributory Negligence.*

In an action arising out of a collision between the wagon of plaintiff and a car of defendant, it appeared in evidence that the wagon was outside the track

in the travelled way and suddenly turned in, and when the car stopped the wagon was in front of it and the horse had almost crossed the track:—
Held, that plaintiff was guilty of contributory negligence.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and overruled.

BLODGETT, J. After verdict for the defendant by direction of the court in this action of trespass on the case for negligence, the case is before this court on plaintiff's exception to the direction of said verdict.

The plaintiff's claim is that his wagon was run into from the rear by a car of the defendant. The language of the trial justice in directing the jury to find a verdict correctly summarizes the testimony, and is as follows:

"The fact is that here is a car coming along on the track; all the witnesses say this carriage was at a sufficient distance—some of them say three or four feet outside of the track, and all of the witnesses say it was outside of the track in the travelled way, and all say it suddenly turned in. All these witnesses who testified at all—excepting Testa—say it turned in, and when it was attempted to stop the car, this happened, and when the car stopped the wagon was in front of the car and the horse had almost gotten over the track on the left hand side. All the witnesses who testified at all in the matter and the majority of them who saw the wagon, saw its position as it is claimed, going on its way in the travelled way." . . . "It is clear it seems to me that this accident was brought about by the act of the driver turning in front of the car in a very short distance; that is, it was the contributory negligence of the driver of the team which brought about this accident."

Plaintiff's exception overruled, and case remitted to the Superior Court with direction to enter judgment on the verdict.

A. V. Pettine, for plaintiff.

Joseph C. Sweeney, Alonzo R. Williams, for defendant.

STATE vs. WALTER D. BUCHANAN.

JUNE 16, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Motor Vehicles. Speed Limit. "Closely Built Up." Criminal Complaints.*

Criminal complaint under Gen. Laws, 1909, cap. 86, § 11, charged defendant with operating a motor vehicle "on Broadway, a public highway in said Pawtucket, where the territory contiguous thereto is closely built up, at a rate of speed greater than fifteen miles per hour."—

Held, that the complaint contained all the information necessary to notify defendant of the nature and cause of the accusation, as he was presumed to know the law, including the definitions therein of "closely built up."

(2) *Motor Vehicles. "Territory."*

Held, further, that under Gen. Laws, 1909, cap. 86, of motor vehicles "territory" is considered with reference to its location as being either within or without the limits of a city, village or town and territory within a city, village or town as being devoted or not devoted to business. The third definition in said section including the provisos has reference to territory outside the limits of a city or village, and is inapplicable to the complaint which charges an offence committed within the limits of a city.

(3) *Specification of Place of Offence.*

Held, further that it was not necessary that the complaint should furnish information in addition to the allegation of place, therein set forth, to enable defendant to ascertain in which section of the city, either business or residential, he was charged with exceeding the statutory speed limit. This he could determine for himself by inspection, or a bill of particulars might be obtained.

(4) *Evidence. Motor Vehicles.*

In a criminal complaint charging a violation of the speed limit, evidence as to what police departments used the Jones Speedometer offered for the purpose of proving the accuracy of the speedometer belonging to defendant, was properly excluded.

(5) *Evidence. Speed Limit. Reasonable and Safe Operation of Motor Vehicle.*

In a criminal complaint charging a violation of the speed limit as the statute prohibits the operating of motor vehicles on any public highway, where the territory is closely built up, in any event, at more than fifteen miles per hour, evidence as to whether defendant was operating his machine in a reasonable and safe manner, was properly excluded.

CRIMINAL COMPLAINT. Heard on exceptions of defendant and overruled.

DUBOIS, C. J. This is a criminal complaint brought in the District Court of the Tenth Judicial District, under Gen. Laws, 1909, cap. 86, § 11, charging that on September 2, 1910, at Pawtucket, the defendant "Did operate a motor vehicle on Broadway, a public highway in said Pawtucket, where the territory contiguous thereto is closely built up, at a rate of speed greater than fifteen miles per hour against the statute and the peace and dignity of the state." Upon arraignment in said district court the defendant pleaded not guilty and was found guilty and sentenced and therefrom appealed to the Superior Court, wherein he filed the following motion to quash: "The defendant comes and moves to quash the above entitled complaint for the reason that said complaint does not specify in what manner the highway therein described was closely built up." The motion was heard and denied by a justice of said Superior Court, and to this denial the defendant excepted. The defendant was thereupon arraigned and pleaded not guilty and the jury trial was had and resulted in a verdict of guilty. The defendant duly filed his motion for a new trial in said Superior Court based upon the grounds that the verdict is against the law and the evidence; that there is from the evidence a reasonable doubt as to the guilt of said defendant, and for newly discovered evidence. The motion was heard and denied by the justice who presided at the trial and to this ruling the defendant took exception. The defendant duly filed and prosecuted to this court his bill of exceptions, based upon the following grounds:

"(1) To the ruling of said justice at the trial of said case in denying his motion to quash the complaint, to which exception was duly taken, as shown upon page two of the transcript of testimony.

"(2) To the ruling of said Justice denying the defendant's motion to direct a verdict for the defendant at the close of the

complainant's testimony, to which exception was duly taken, as shown upon page 37 of said transcript of testimony.

"(3) To the ruling of said Justice in refusing to admit in evidence testimony as to what police departments use the Jones Speedometer in their official testing, to which exception was duly taken, as shown upon page 66 of said transcript of testimony.

"(4) To the ruling of said Justice in refusing to admit in evidence whether or not the defendant was operating his machine going down Broadway in a reasonable and safe manner, to which exception was duly taken, as shown upon page 78 of said transcript.

"(5) To the ruling of said Justice denying the defendant's motion to direct a verdict for the defendant at the close of the defendant's testimony, to which exception was duly taken, as shown upon page 93 of said transcript.

"(6) To the refusal of said Justice to charge the jury in accordance with the requests duly presented by said defendant, to which exception was duly taken, as shown upon pages 95 and 96 of said testimony.

"(7) To the decision of said Justice denying the defendant's motion for a new trial, to which exception was duly taken, which motion was based upon the following grounds. (1) The verdict is against the law. (2) The verdict is against the evidence and the weight thereof. (3) The verdict is against the law and the evidence and the weight thereof. (4) That there is from the evidence a reasonable doubt as to the guilt of said defendant. (5) The defendant has discovered new and material evidence which he had not discovered at the time of the trial of said cause, and which he could not have discovered at said time by the exercise of reasonable care.

"And the defendant avers that all of said rulings constitute error prejudicial to him and that said errors entitle him to a new trial or to be discharged;" and the case is now before this court for the determination of the validity of the foregoing exceptions.

The section of the statute under which the complaint in

question was brought reads as follows: "Sec. 11. No person shall operate or cause to be operated a motor vehicle on the public highways of this state recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger property or the life or limb of any person, or in any event on any public highway, where the territory contiguous thereto is closely built up, at a rate of speed greater than fifteen miles per hour, or elsewhere at a rate of speed greater than twenty-five miles per hour, subject, however, to all other provisions of this section and of this chapter, relative to the operation of such vehicles."

Section 1 of Cap. 1592, Public Laws, passed at the January Session, 1908 (which became Gen. Laws, 1909, cap. 86, § 1), was amended by cap. 454, § 1, Pub. Laws, passed May 7, 1909; the portion thereof defining "closely built up" reads as follows: "(8) 'closely built up' shall mean (a) the territory of a city, village, or town contiguous to a public highway which is at that point built up with structures devoted to business, (b) the territory of a city, village, or town contiguous to a public highway not devoted to business, where for not less than one-quarter of a mile the dwelling-houses on such highway average less than one hundred feet apart, and also (c) the territory outside of a city or village contiguous to a public highway within a distance of one-half mile from any post-office: *Provided*, that for a distance of at least one-quarter of a mile within such limits the dwelling-houses on such highway average less than one hundred feet apart; and *provided, further*, that the city and town officers having charge of such highway shall have placed conspicuously thereon signs, of sufficient size to be easily readable by a person using the highway, bearing the words, 'slow down to fifteen miles,' and also an arrow pointing in the direction where the speed is to be reduced."

- (1) The motion to quash was properly denied. The complaint contains all the information necessary to notify the defendant of the nature and cause of the accusation against him. He is presumed to know the law, including the foregoing definitions

of "closely built up." Therein the legislative intent is so perfectly apparent that he who rides may read, and reading, understand.

- (2) Under the foregoing statute "territory" is considered with reference to its location as being either within or without the limits of a city, village or town; and territory within a city, village or town as being devoted or not devoted to business. Under the present complaint the defendant is clearly charged with an offence alleged to have been committed within the limits of the City of Pawtucket, and that being the case the third definition of "closely built up" is inapplicable to the present consideration. The third definition, including the provisos, clearly has reference to territory outside the limits of a city or village. Therefore it is unnecessary to allege and prove the existence of signs and arrows within the city limits, where none are required by the terms of the statute. Any motor traveller having ordinary powers of observation can tell when he has passed the suburbs of a city or town and has arrived within the compact portion thereof. In such circumstances he should no longer seek for a sign, but should pay attention to the closeness of the structures on the territory contiguous to the highway whereon he is travelling. If they come within the statutory definition of "closely built up," whether it be in the business or residential portion of the municipality, he must reduce the speed of the motor vehicle under his control to a rate not exceeding fifteen miles per
- (3) hour or take the consequences of his disobedience. Nor is it essential that the complaint should furnish information in addition to the allegation of place, therein set forth, to enable the defendant to ascertain in which section of said city, either business or residential, he is charged with exceeding the statutory speed limit. All he is obliged to do is to go to Broadway and upon inspection, determine for himself. If it so happened, which does not appear to be the fact in this case, that Broadway included both residential and business sections, so that he was unable to come to a correct conclusion upon a view of the premises, a motion for a bill of particulars to confine the charge

within a limited area on the highway would be entertained and granted. An examination of the Broadway introduced in evidence (State's Exhibit 1) shows the territory contiguous thereto to be largely residential.

The second exception relates to the refusal of the court to direct a verdict for the defendant at the close of the complainant's testimony on the ground, as appears from the transcript, that the State has not shown that signs were placed on the highway, in accordance with the provisions of Chapter 1909, cap. 86, § 1. This exception must be overruled for the reasons above stated.

- (4) The third exception is based upon the refusal of the court at the trial to permit William H. Johnson, Jr., to introduce Jones' Speedometer, the New England Branch of the defendant, to answer the following question: "Do you know what police departments use this particular speedometer in their official testing?" The transcript shows the following: "Mr. CROSS: I object. What is the purpose of it? It makes no difference. Mr. TILLINGHAST: To show they are using it. Mr. CROSS: I object. It is not relevant. Mr. TILLINGHAST: To show their standing. Mr. CROSS: I object. It is not relevant. Objection sustained. Exception taken by Mr. TILLINGHAST. The question asked, being susceptible of a categorical answer in the affirmative or negative, was unobjectionable. The explanation offered by the interrogating attorney was intended to elicit information tending to show the accuracy and standing of that make of speedometer, it was properly excluded. The fact, if it is a fact, that several of the police departments in the United States made use of this particular speedometer in their official testing would only prove the faith of the several departments in the accuracy or the efficiency of the salesman employing the speedometer. This was not a proper way to show the accuracy of this kind of speedometer in comparison with the one belonging to the defendant in particular."

The fourth exception relates to a ruling of the court refusing to permit the defendant to answer the following question: "Do you know what police departments use this particular speedometer in their official testing?"

question; asked of him by his own counsel in direct examination:

(5) "55 Q. And whether or not on this day in question you were operating your machine, going down Broadway, in a reasonable and safe manner?" The ruling was perfectly proper. The statute prohibits persons from operating motor vehicles *in any event* on any public highway, where the territory is closely built up, at a rate of speed greater than fifteen miles per hour. This is the standard by which all must be measured. Any excess of speed, however slight, constitutes an infraction of the statute, notwithstanding the fact that care was exercised by the operator to have his machine under perfect control, and that he was operating the same safely and in a manner that, except for the prohibition of the statute, would have been reasonable. It is true that the statute also prohibits all persons from operating motor vehicles recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highway, or so as to endanger property or the life or limb of any person. Of course there are times when the operators of motor vehicles must bring the same to a full stop, when any rate of speed whatever would be criminal carelessness. There are times when it would not be safe to proceed at the rate of one mile an hour, for example: in a crowded street with a procession of children passing. So there might be times when a person would be liable for breach of the statute when he was proceeding along a public highway at a rate of speed much less than fifteen miles per hour. But if a person going at a rate of speed less than fifteen miles per hour should be arrested upon a complaint charging him with operating a motor vehicle recklessly, or at a rate of speed greater than was reasonable and proper under the circumstances or so as to endanger the life or limb of any person, then and in such case, the question of his care, reasonableness and propriety in operating the machine would become of vital importance to the decision of the case. In the case at bar no such question arises.

The fifth exception was taken to the refusal of the justice presiding to direct a verdict for the defendant at the close of the testimony. The testimony as to the rate of speed at which

the defendant was operating his machine at the time and place complained of was conflicting and was a proper subject for decision by the jury. The motion was properly denied and the exception is without merit.

The sixth exception was taken to the refusal of the trial judge to charge the jury in accordance with the following requests: "Before the jury can find the defendant guilty they must find (1) that he intentionally operated the car recklessly; (2) that he intentionally operated the car at a rate of speed greater than is reasonable and proper having regard to the width, traffic and use of the particular highway or (3) that he intentionally operated the car so as to endanger the property, the life, or the limb of any person in the particular streets traveled over.

"That in operating the car at from 15 to 25 miles an hour, is not sufficient, under the proof in this case to convict the defendant, and that unless they find the car was driven at more than 25 miles an hour, their verdict must be in favor of the defendant." The charges were properly refused for the reasons already given and the exception has no validity.

The seventh exception was taken to the decision of the trial justice denying the defendant's motion for a new trial upon the grounds that the verdict is against the law and the evidence and that the defendant has discovered new and material evidence.

There has been no suggestion either in the brief or argument of the defendant concerning the manner in which the jury has disregarded the law as laid down to them by the justice of the Superior Court who presided at the trial of the case at bar and we have been unable to discover any such violation. We cannot say from a bare inspection of the transcript that the verdict is against the evidence or the weight thereof or that there is any reasonable doubt of the guilt of the accused. The testimony came from the mouths of living witnesses and the weight of evidence proceeding from their testimony was to be ascertained by the jury. There is nothing to indicate that the jurors were prejudiced against the defendant or in favor of the witnesses for the prosecution, or that their verdict was the result of any improper motive. Moreover, it has been approved

by the justice who heard the witnesses upon the stand; a verdict so approved will not be set aside except for the best of reasons. See *State v. Badnelley*, 32 R. I. 378. The newly discovered evidence consists of the opinion of a civil engineer who has made affidavit that on the day in question, about noon-time, he was in a trolley car on Broadway, in Pawtucket, and noticed a touring car going down Broadway, being driven by a middle aged man with a younger man sitting on the seat with him, and a party of ladies in the tonneau, that the car and touring car were going towards Pawtucket. That during the entire trip the trolley car went, in his opinion, not to exceed twelve miles an hour, and that in his opinion at no time while said touring car was proceeding down Broadway towards Main street square did it exceed the speed of twelve or fourteen miles per hour. That he afterwards noticed that the same car was being "held up" by Officer Wadsworth. Even admitting that the identity of the defendant with the person in the car held up by the officer is sufficiently established, the evidence of the witness would be merely cumulative and that of his opinion. In the trial of the case the defendant and his chauffeur relied upon the accuracy of the speedometer on the car and were able to testify therefrom that the speed of the car did not exceed fourteen and one-half miles per hour on Broadway in the city of Pawtucket. It is apparent that the opinion of the new witness would not be likely to change the result.

The motion for a new trial was properly denied, and the defendant's exception to such denial must be overruled.

All of the exceptions are therefore overruled, and the case is remitted to the Superior Court for sentence.

William B. Greenough, Attorney-General, Harry P. Cross, Second Assistant Attorney-General, for State.

John A. Tillinghast, for defendant. Elmer E. Cooley, of counsel.

DANIEL H. HORTON vs. FRANK C. STONE

JUNE 16, 1911.

PRESENT: Dubois, C. J., Johnson, and Parkhurst.

(1) *Evidence. Bonds. Res Gestæ.*

In an action against a surety upon a bond, the evidence of defendant sign the blank bond, as to the signing of the bond and stipulations at the time is competent as a part of the *res gestæ*.

(2) *Replevin. Bonds. Agency. Principal and Sureties.*

A replevin bond was signed, "Frank C. Stone by Henry Wood, two sureties. It appeared that the bond was signed by the officer in blank at the request of Wood and delivered to Wood with the stipulation that it was signed for Stone and only on condition that it be sent to Stone who was away to be signed by him as he (defendant) never authorized its delivery to anyone except on that condition. The bond was signed by Wood, as above, as an officer:—

Held, that (1) the bond was not a valid statutory bond. It has been so decided by both the district and superior courts and no objection to such decision is *res adjudicata* in the case. Inspection of the bond shows that it is not in compliance with 1896, cap. 272, § 3 (now Gen. Laws, 1909, cap. 336, § 3).

(3) *Bonds. Delivery. Escrow. Principal and Sureties.*

Held, further, that no valid delivery of the bond was ever made, and it is not binding upon the surety, but the delivery was simply in violation of the law. There was no authority upon Wood to sign Stone's name and deliver the bond in invalid form to the officer.

(4) *Bonds. Sureties Not Bound Unless Principal Signs.*

Held, further, that the bond without the signature of the principal is void, as to the sureties.

(5) *Bonds. Putting Obligee on Notice. Replevin.*

Where an officer is tendered a bond in replevin not in accordance with the execution thereof in the name of the principal by a third person, it is the duty of the officer to put him upon inquiry whether the sureties who have signed the bond could be held thereunder.

DEBT ON BOND. Heard on exceptions overruled.

PARKHURST, J. This is an action of debt on a bond brought against Frank C. Stone as principal, and

Smith, and William E. Arnold, named as sureties in a replevin bond, naming the plaintiff as obligee, attached to a writ of replevin wherein Frank C. Stone was named as plaintiff, and Daniel H. Horton was named as defendant.

Upon this writ of replevin certain personal property, which Horton had attached as the property of Henry M. Wood, in a suit of Frank Maroni v. Henry M. Wood, was taken from Horton's possession, and turned over either to Wood or Smith, and finally through one or the other of them came into the possession of Frank C. Stone.

The replevin bond was dated April 30th, 1902, and sets out Frank C. Stone, of Taunton, Massachusetts, as principal, and William E. Arnold and Walter W. Smith, both of Providence, as sureties. The bond purports to be signed: Frank C. Stone by Henry M. Wood; William E. Arnold; Walter W. Smith; and to be sealed. This writ of replevin was entered in the District Court of the Sixth Judicial District, and on May 22nd, 1902, the entry was made: "Writ dismissed (insufficient bond)."

The writ in this present action was served upon Frank C. Stone and William E. Arnold, but Walter W. Smith, co-surety, not being found and having no last and usual place of abode within the officer's precinct, was not served with process. Demurrer to the original declaration was sustained upon the grounds that the declaration did not allege that Henry M. Wood had authority to execute said bond in behalf of Frank C. Stone, and also because it does not appear in said declaration that said bond was executed by said Frank C. Stone in person or by any person in his behalf. Certain other grounds of demurrer were overruled, and it was held that the bond was not sufficient as a statutory bond; the question whether the obligors who executed the bond were liable on the same as a common law obligation, was left to be determined upon evidence as to the obligation of the principal and as to whether the sureties delivered it under such circumstances as to make it obligatory upon them alone. The bond is a joint and several bond. The amended declaration is in two counts against William E.

Arnold only, one of the sureties, and his demurrer thereto was overruled.

The case at bar, upon the amended declaration, against William E. Arnold alone, was tried in the Superior Court before a jury, on November 10, 1909, and a verdict for the defendant was directed by the trial judge, on the ground that it affirmatively appeared that the defendant Arnold (having, as the evidence showed, signed the bond in blank at the request of Henry M. Wood, and delivered the same to Wood upon the express stipulation that he was doing it for the sake of Stone, the plaintiff in replevin and the principal in the bond, and that Stone was to sign as principal), relied on Stone's signing or somebody for him so that his signature should be a valid signature to the bond; and that, as this was not done, the defendant was not liable.

The declaration was in two counts, and the defendant pleaded *non est factum* to both; with an additional plea to the second count that Henry M. Wood, the defendant in the original action where the attachment was made, was adjudged a bankrupt on May 4th, 1906, and that Frank Maroni, creditor, was named in the schedules, and that said bankrupt was duly discharged from bankruptcy on October 8th, 1906. The date of the writ in this present action of debt on bond was March 26th, 1906.

It will not be necessary for us to consider the effect of this latter plea, as the same and the evidence adduced in support thereof are entirely immaterial, in our view of the case.

The plaintiff duly excepted to the decision of the court below in granting the motion of the defendant for the direction of a verdict and in directing the same, and has duly brought his bill of exceptions to this court, setting forth said exception and also certain other exceptions, relating to the admission of testimony regarding the bankruptcy and discharge of Henry M. Wood, in support of the plea above referred to (and which, as above stated, we shall disregard as immaterial so far as that plea is concerned); and certain other exceptions relating to the admission of the testimony of Henry M. Wood as to a certain

conversation had between Wood and the defendant Arnold regarding the execution of the replevin bond by Arnold.

- It appears in evidence, that the property attached as the property of Wood in the suit of *Maroni v. Wood*, was in the custody of Wood at the time of the attachment; but there is no conclusive evidence whether it was owned by Wood or Stone. Stone was in the South, at that time; and Wood, claiming that it was the property of Stone, and to protect Stone's interest, went at once to a lawyer to procure a writ of replevin. He obtained a printed blank writ of replevin with blank bond attached to it in the usual statutory form, and took it to the defendant Arnold, without any of the blanks having been filled out, and asked Arnold to sign it as a surety, no seals being then
- (1) thereon. Wood testifies as follows, in regard to his conversation with Arnold (p. 19): "Q. 9. What was said between you and Mr. Arnold at the time of the signing of this paper in relation to the signing of the paper? A. I took this paper to Mr. Arnold and asked him to sign it. I told him it was a bond and he asked if it was for me, and he said if it was he wouldn't sign it, and I told him no, it was for Frank C. Stone, and he asked if Frank C. Stone was going to sign it, and I said he was, and he said, 'if Stone is going to sign it I will sign, otherwise I won't.' Q. 10. Who is this Mr. Stone? A. He is a lumber merchant or agent. Q. 11. Do you know whether he is related in any way to Mr. Arnold? A. I think he is. Q. 12. Now, I will ask you if you will look at those other papers that are before you. Just a moment, in relation to this paper. After Mr. Arnold signed it what did you do with it? A. I took it back to Mr. Bean, and he put on the seals and got Mr. Smith to sign it. The seals were not on it when Mr. Arnold signed it because he didn't have any in the office. Q. 13. Was the bond filled out or was the bond blank? A. It was entirely blank, just simply the printed matter on it when I took it to Mr. Arnold." It is this conversation which is the subject of plaintiff's exception above referred to. We find no error in its admission. Wood was in fact the only witness who saw the defendant sign the blank bond, and it was entirely proper that

he should be examined in relation to the facts within his knowledge relating to the signing of this bond by the defendant, and to the defendant's stipulations at the time; these facts were properly a part of the *res gestæ*, and their exclusion would have been improper.

The defendant Arnold was examined as a witness in his own behalf upon the same matters as were the subject of inquiry from Wood, and testified fully as to his conversations with Wood at the time of his signing the bond and as to all the circumstances connected therewith; in effect Wood's testimony was corroborative of Arnold's. The defendant repeatedly says that when Wood brought him the blank bond and asked him to sign as surety, he asked Wood if it was for him (Wood), or for Stone that he was to sign, and was informed that it was for Stone, in order to replevy Stone's property from an attachment; that he distinctly told Wood over and again that he would only sign it for Stone, and on condition that Stone was to sign it as principal; that Wood fully understood that the bond was to be signed by Stone, before delivery, and that only on this understanding did he sign the bond and allow Wood to take it away; that he (defendant) never delivered the bond to the plaintiff, nor authorized its delivery to any one except upon this express condition; that he did not know whether or not it had ever been delivered, and never saw it afterwards, until it was produced in court; that he knew Stone was away at the time he signed it, and it was the distinct understanding with Wood that the bond was to be sent to Stone to have his signature also placed thereon. There is not a word of testimony to contradict these statements of Wood and Arnold as to this understanding and condition that the bond was to be signed by Stone as the principal obligor before it should be delivered and become a valid obligation as against the defendant.

Under these circumstances, and in view of the fact that the bond was not signed by Stone, but was in fact signed "Frank C. Stone by Henry M. Wood," and in that form was allowed by Wood to pass into the hands of the officer serving the writ of replevin, we are of the opinion (1) that the bond itself, in

that form was not a valid statutory bond; (2) that no delivery of the bond was ever made, so as to make it a binding obligation upon this defendant; (3) that the bond, without the signature of the principal obligor, is void, as to the sureties.

- (2) 1. The bond is not a valid statutory bond. It was so held both by the district court, in dismissing the replevin suit, and also by the Superior Court, in this suit, after a hearing upon demurrer; no exception or objection was taken to either decision, and so this point is *res adjudicata* so far as this case is concerned. Furthermore, a mere inspection of the statute regulating replevin suits (Gen. Laws, 1896, chap. 272, § 3, now re-enacted in Gen. Laws, 1909, chap. 336, § 3), which reads as follows: "Sec. 3. The officer charged with the service of any such writ shall, before serving the same, take from the plaintiff or some one in his behalf a bond to the defendant with sufficient sureties in double the value of the goods and chattels to be replevied." . . . &c., shows that the bond is not the bond either of the plaintiff or of some one in behalf of the plaintiff; it is on its face imperfect and incomplete, in that it purports to be executed in the name of the plaintiff by a third person who is not shown to have had any authority whatever to bind the plaintiff in this way. Furthermore, the evidence shows that the plaintiff in replevin was out of the state at the time the bond was signed and knew nothing about it. If Wood wished to give bond on behalf of the plaintiff in replevin, under the statute, he should have given bond in his own name in behalf of the plaintiff, and that would have complied with the statute. (See *Dunbar v. Scott*, 14 R. I. 152). As it is, neither the plaintiff in replevin (Stone) nor Wood is bound by the bond as attempted to be executed. The plaintiff in this case, Horton, therefore was not bound to surrender the goods under attachment in his hands, for he should have seen that the bond was not in accord with the statute; and the form of the bond with
- (5) this attempted execution thereof was at least sufficient to put him upon inquiry whether the sureties who had signed the same could be held thereunder.
- (3) 2. We are of the opinion that no valid delivery of the bond

was ever made, so as to make it a binding obligation upon this defendant. As shown above, it is the undisputed testimony that the defendant, when he signed as surety, at the request of Wood, did so upon the express condition that the plaintiff in replevin, Stone, should sign the bond as principal before it should become binding. The delivery of the bond upon this condition to Wood was a mere delivery *in escrow*, and Wood had no authority to deliver this paper to anybody until it had been signed by Stone. The mere fact of the signature by the defendant upon the blank form, and its delivery to Wood, could, at most, only be held to authorize Wood to have the blanks filled so as to make it a valid replevin bond for the purposes of the suit according to the statute; it certainly could not be held that there was any implied authority conferred upon Wood to sign Stone's name to it without authority, even if there had not been the express stipulation that it must be signed by Stone.

The delivery to Wood then, he being a third party and a stranger to the suit, being a mere delivery *in escrow*, conferred no authority upon Wood, to sign Stone's name by himself, and to deliver the bond in this insufficient and invalid form to the officer who served the writ of replevin, so as thereby to make a valid delivery to such officer and so that such delivery would enure to the benefit of this plaintiff. The circumstances of this case, involving the attempted delivery of a bond invalid and incomplete on its face, bring it clearly within the doctrine laid down by the Supreme Court of the United States, in *Pauling v. United States*, 4 Cranch. 219, which was a suit upon a bond given by a collector of internal revenue. In that case it appeared that the principal obligor and four sureties signed the bond; that two other sureties were named in the bond but did not sign; that the bond after signature by the four sureties was by them delivered to Ballinger, the principal obligor, with the express condition that it should be executed by the other two sureties before delivery to the supervisor of the revenue; and that Ballinger, without authority and in violation of this express condition, delivered the bond. It was

claimed by the sureties, and evidence was given to the effect, that the delivery upon said condition to Ballinger, the principal obligor, was merely a delivery *in escrow*; that Ballinger had no right to deliver the bond to the supervisor, until the other two sureties had signed. Upon demurrer to the evidence it was held that evidence of the facts stated, if believed by the jury, would warrant a verdict that the bond was delivered on condition; and that the condition not having been performed, the bond, as to the sureties, remains as *in escrow*. Again, in the case of *United States v. Leffler*, 11 Pet. 86, which was an action on a tax collector's bond, the evidence of the principal obligor, Curtis, was offered by the surety and admitted by the circuit court, in support of the plea of *non est factum*, showing that the sureties executed the bond under the impression, and on the condition that the principal obligor could procure the signatures of other persons to the same, and they were not so procured. The jury found a verdict for the defendants; and upon exceptions in the Supreme Court, raising the question of the competency of the evidence, it was held that, inasmuch as the principal obligor, Curtis, having suffered judgment to go against him in the suit, and having been arrested, and afterwards discharged from custody under the insolvent laws, prior to giving his deposition had been released by the defendants from all obligations to them as co-obligors on the bond in suit, he had no interest in the event of the suit, and his testimony was competent. And the judgment of the circuit court was affirmed.

In the case of *Dair v. United States*, 16 Wall, 1, the court found that the bond was perfect on its face, and apparently duly executed by all whose names appeared therein and delivered to the obligee without notice of any condition, as claimed by the sureties in defence, that other sureties should sign the bond; and so, that such defence was not available to the sureties. In commenting upon and distinguishing the case of *Pawling v. United States*, 4 Cranch, 219, the court says, as follows (p. 5): "The case of *Pawling et al. v. The United States*, has been cited as an authority against the position taken in this

case; but it is not so, because the additional procured in that case were named on the face this fact is stated in the plea. If the name appeared as a co-surety on the face of this bond would not apply, for the reason that the instrument would have been brought to the notice of the government, who would have been permitted to ascertain why Cloud did not execute it, and the inquiry would have disclosed to him the exact things.

"In any case, if the bond is so written that several were expected to sign it, the obligee takes that the obligors who do sign it can set up in default of execution by the others, if they agreed to sign only on condition that the other co-sureties execute." And to the same effect, see *Fletcher v. Vt.* 447; *Bibb v. Reid*, 3 Ala. 88; *Sharp v. Watts*. (Pa.) 21; see also, recognizing the same principle, *Herdman v. Bratten*, 2 Harr. (Del) 396; *Lor v. Wend.* 380; *Ward v. Churn*, 18 Gratt. 801; *16 W. Va.* 110, 121, *et seq.*; *Stuart v. Livesay*; *People v. Bostwick*, 32 N. Y. 445, and *Fitts v. Rep.* (N. C.) 291.

- (4) 3. We are further of the opinion that the bond, signature of the principal obligor, is void, as stated in *Bean v. Parker*, 17 Mass. 591, which was a case where the defendants as sureties upon a bail bond guaranteed the defendant from arrest in a civil suit, it appears that the defendant, as the principal debtor appeared on the bond; that the bond on its face purported to be signed by the defendant, and a seal was affixed and a signature was written opposite the seal, but that he did not sign the signatures of his sureties appearing thereon; that the bond was void as to the sureties, (p. 604): "And it appears it was never signed by Aiken, who should have been principal; the bond being only his sureties, as appears by the tenor of the bond."

ment. Now, we think it essential to a bail-bond that the party arrested should be a principal: it is recited that he is; and the instrument is incomplete and void without his signature. The remedy of the sureties against the principal would wholly fail or be much embarrassed, if such an instrument as this should be held binding. Suppose they wish to arrest the principal in some distant place, or in some other state, what evidence would they carry with them that they were his bail? There is nothing to estop him from denying the fact, nor any proof that it was true. In a suit against him, they would be unable to prove that he was ever arrested, or had ever given bond, except by the return of the officer; and that would not prove that *they* became bail, but only that bail was taken. By our statute before cited, the bail are all along considered as *sureties*; and a principal is recognized in every section."

In *Wood v. Washburn*, 2 Pick. 24, it was held that where an administration bond was not executed by the administrator, the sureties were not liable, referring to *Bean v. Parker*, *supra*.

In *Russell v. Annable*, 109 Mass. 72, it was held that a bond given under statute for the dissolution of an attachment of partnership property, and executed in the name of the firm by only one of two partners named as principals therein, cannot be enforced against a surety without evidence of the assent of the other partner to its execution. On page 74 the court says: "The bond purports to be the joint and several contract of certain persons named therein as principals, and the defendant and George M. Stevens as sureties. The defendant's undertaking is only that the principal obligors shall fulfill the obligation which by the terms of the bond they have assumed. But if the bond was not binding upon both Dennett and Pottle (as it was not, for want of due and proper execution of the instrument on their part), they assumed no obligation, and it was not binding upon the sureties. It was essential to the bond that the principals should be parties to it; it is recited that they are so, and the instrument is incomplete and void without their signature. The remedy of sureties against their principals might be greatly embarrassed, if such an instrument as this

should be held binding. There is nothing to estop any member of the firm, who did not sign it, from denying that he was a party to it, and it was no part of the defendant's contract that he should be surety for one member of the firm, and not for both. The instrument is incomplete without the signature of each partner, or proof that the signature affixed had the assent and sanction of each of them. The sureties on a bond are not holden, if the instrument is not executed by the person whose name is stated as the principal therein. It should be executed by all the intended parties. *Bean v. Parker*, 17 Mass. 591. *Wood v. Washburn*, 2 Pick. 24."

To the same effect, see *Goodyear, &c. v. Bacon*, 151 Mass. 460, citing all of above cases. *Dole Bros. Co. v. Cosmopolitan Preserving Co.*, 167 Mass. 481, citing above cases. See also,—*Ney v. Orr*, 2 Mont. 559, citing with approval many of the cases *supra*. And these last cited cases pointedly distinguish the cases where a bond perfect upon its face and apparently duly executed by all whose names appear thereto, purported to be signed and delivered and was actually delivered without a stipulation.

Plaintiff's counsel cites a number of cases to the effect that the omission of the name of the principal as one of the signers of a bond, even where his name appears in the body of the bond as principal, is a mere technical defect, and will not release the sureties, except in case where the sureties sign upon conditions, known to the obligee, that the bond is not to take effect until signed by the principal. It is not necessary to review these cases. In most of them, where a statutory or official bond was required, it was found that the statute or regulation under which the bond was given did not require that the principal should personally sign the bond; and in all of them it was found that the principal, being elected or appointed to an official position and bound to perform official duties according to law, was just as much legally bound for his defaults as if he had signed the bond and equally liable to reimburse his sureties for any moneys required to be paid by them to make good his defaults, whether he signed the bond or not. The only case

cited by the plaintiff's counsel in support of the proposition above set forth, which seems to be directly applicable to the case at bar, is the case *Ney v. Orr*, 2 Mont. 559, *supra*, and that is directly contrary to the plaintiff's contention, inasmuch as it holds that an appeal bond was not a good statutory bond on its face, because not signed by the principal obligor; that the obligee had notice of the insufficiency of the bond on its face when it was filed; and that the sureties were not bound.

For the reasons above set forth, we are of the opinion that the decision of the court below in directing a verdict for the defendant was fully justified, both by the law and by the evidence before him. The plaintiff's exceptions are overruled, and the case is remitted to the Superior Court with direction to enter its judgment for the defendant upon the verdict.

From the record in this case it appears that Mr. Justice Sweetland, while a justice of the Superior Court, presided at a hearing in said case which involved, to some extent, the questions now before this court. He is of the opinion that he is disqualified under the statute from taking part in the consideration and determination of the case, and has withdrawn from such consideration and determination.

William M. P. Bowen, for plaintiff.

Harry C. Curtis, for defendant.

JOHN PYPER vs. JOSIAH A. WHITMAN.

JUNE 16, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Unrecorded Plat Used in Sale of Land. Easements. Ways.*

Where there is no grant of a right of way by express terms in a deed or by reference to the plat and no claim of a right of way acquired by implication by reason of any actual existing way in use as an apparent and continuous easement and no claim of a right of way by necessity, a grantee acquires no right of way in a street delineated upon an unrecorded plat used by grantor

in advertising and selling his land, merely by the exhibition to grantee of the plat prior to the sale of the land to him, on which plat there was a street delineated and shown under the name of Conimicut avenue, and on which the land purchased by grantee abutted, and therefore grantee is not entitled in equity to have the way opened and laid out as shown upon said plat.

BILL IN EQUITY. Heard on appeal from decree of Superior Court, and appeal dismissed.

PARKHURST, J. This is a bill in equity brought by the complainant against the respondent, alleging:

1. That the complainant on the first day of November, 1898, bought of the respondent by warranty deed, the real estate described in the first paragraph of the bill.

2. That at the time of the purchase, the real estate described in the bill with other real estate belonging to the respondent adjacent thereto and forming a part thereof, had been platted by the respondent into house lots; that the plat entitled "Conimicut Plat, Warwick, R. I., the property of Josiah A. Whitman, 1875," showed certain streets thereon, and among them Beach avenue, Conimicut avenue, and Woodland avenue; that a lithographic copy of said plat, with slight changes, was issued subsequent to the original plat.

3. That said plat was never recorded, nor was said lithographic copy thereof ever recorded by said respondent.

4. That said lithographic copy of said plat was issued and delivered by said respondent to many residents of Warwick, including the complainant, and was used by the respondent extensively in advertising said land for sale by posting the plat in divers public places in the town.

5. That at the time the complainant purchased the said real estate, the respondent exhibited to the complainant the lithographic copy of the original plat and represented and stated to the complainant that the real estate described in the first paragraph of this bill was included in said plat, and that said real estate was a part of the respondent's real estate shown upon the plat; that said respondent at the time of said purchase, represented to the complainant that all of said streets

and avenues designated upon said plat would be laid out and opened up for public use as shown on said plat.

6. That said complainant, acting upon the representations and allegations of the respondent as to said plat, purchased said real estate and paid a large price therefor, and that the value of said real estate depended at that time and depends now largely upon the opening and dedicating of said streets and avenues upon which said real estate bounds, in accordance with said plat; that the complainant's real estate would be much less valuable unplatted than platted.

7. That said complainant is informed and believes that said respondent has decided to abandon Conimicut avenue as laid out on said plat, and in pursuance of such determination has replatted his land to the west of said complainant's above described real estate and has removed Conimicut avenue or laid out a new street or avenue called Conimicut avenue, one hundred (100) feet west of Conimicut avenue as laid out on said plat, leaving said complainant's land on the westerly line immediately joining said respondent's land not having Conimicut avenue separating said complainant's and said respondent's land as shown on said plat.

8. That by replatting his said land and removing Conimicut avenue as aforesaid, said respondent deprives said complainant of egress and ingress to and from his real estate on the west to Conimicut avenue as originally laid out, and said complainant alleges that this action of removing Conimicut avenue renders the complainant's land less valuable than it would otherwise be.

The complainant prays:

1. That the respondent may be enjoined from recording any plat which he may have made or caused to be made since the date of said complainant's deed, wherein and whereby the lines of said Conimicut avenue have been changed.

2. That a decree of this court may be made declaring and establishing Conimicut avenue as a way or street as laid out and defined upon said plat for the benefit of said complainant's real estate and all other real estate bounding upon said avenue.

3. That the respondent be restrained and enjoined from

selling, conveying, mortgaging or otherwise encumbering any of the land included within the line of said Conimicut avenue as laid out on said plat above referred to.

The respondent demurred to the bill of complaint, his demurrer being as follows:

"First. It does not appear that said sale and conveyance of said real estate by the respondent to the complainant, and said other alleged acts of the respondent, or any of them, were fraudulent or unlawful, or that the complainant is entitled to relief on account thereof.

"Second. It does not appear that the alleged abandonment of Conimicut avenue, and the alleged replatting of land, by the respondent, or either of said acts, would be fraudulent or unlawful, or that the complainant is entitled to relief on account thereof.

"Third. It appears that neither of said plats mentioned in the second paragraph of said bill was recorded.

"Fourth. The description of said premises, set out in said bill, does not mention either of said plats, nor said Conimicut Avenue, nor Woodland Avenue; nor does it appear that either of said plats, or avenues, was mentioned in said deed.

"Fifth. So far as appears, said Beach Avenue was a street or highway laid out upon the ground before the making of said conveyance, and before the alleged making and issuing of said plats; and still continues so to be.

"Sixth. Said bill does not set out a valid agreement or undertaking by the plaintiff to lay out and open the streets and avenues delineated upon said alleged lithographic copy of said alleged original plat, mentioned in the fifth paragraph of said bill.

"Seventh. So far as appears, said deed of conveyance is complete and perfect, and defines all the rights of the complainant in the premises."

The Presiding Justice of the Superior Court, after hearing upon the demurrer, sustained the same, and entered a final decree dismissing the bill; and from that decree this appeal is taken by the complainant.

Counsel for complainant frankly admits in his brief, that he has been unable to find any decided case which sustains his bill. Nor has any case been cited upon argument before this court, or brought to our attention in any way, which will sustain the complainant's contentions.

The deed to the complainant is of a single tract or parcel of land by metes and bounds; and the only way or road mentioned in the deed is called Beach avenue, which was apparently a public traveled way, and is the easterly boundary of the tract. There is no mention of Conimicut avenue in the deed; nor is there anything to show that Conimicut avenue was ever laid out or used as a way either public or private, or in connection with this land deeded to the complainant, or with any other land of the complainant's grantor. It is not claimed by the complainant as a way of necessity; although he does claim that, if it were laid out as delineated on the plat exhibited to him and others, before he received his deed, it would be of great convenience to him, and would greatly enhance the value of his land.

- (1) There being, then, no grant of a right of way by express terms by the deed, or by reference to the plat, no claim of a right of way acquired by implication by reason of any actual existing way in use as an apparent and continuous easement, and no claim of a right of way by necessity, we are unable to find that the complainant has acquired any right of way in Conimicut avenue (so-called) merely by the exhibition of a plat to him prior to the sale of the land to him, on which plat there was a street delineated and shown under the name of Conimicut avenue.

In the case of *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564, 572, which was a bill in equity to restrain the respondent from shutting up a certain way leading from a public highway to the works of the complainant, over land of the respondent, on the ground expressly set forth by the complainant that, at the time of the execution of the deed to the predecessor in title of the complainant, the way in question had been created, was already existing, and being necessary to the

enjoyment of the estate conveyed, passed to the way appurtenant to that estate; the court evidence, that, at the time the deed was given, the question had not been opened to the land of the grantor that the way claimed was not a way of necessity. In the course of the opinion the court says, quoting from *Barlow v. Rhodes*, 1 C. & M. 439, "a party means to grant a way which is not a mere enjoyment of the premises demised, he must use apt words for that purpose." (p. 577) It is sufficient to say upon this point, that the way was opened, at the time this deed was executed, to the grantor's land; that any declaration of any intent to open a way or that it should be made appurtenant to the land was evidence to pass an interest in any estate, not theirs, short of their deed, pass any such interest in a public way may be given to the public without a deed by a deed it cannot be vested in them, but an interest must be by deed." (p. 578) "The plaintiffs' contention that the defendants are estopped to deny the existence of a way because they had agreed that the grantees should have such a way; that no consideration had been given for that; that the grantees have entered into the land and expended large sums of money upon the faith of the deed for the way. There is nothing in the facts for the court to say. There has been no expenditure which would be made without such agreement, and must necessarily be made in the construction of their own works. The deed was by parol, if any, and was merged in the deed. The case was dismissed.

In Goddard's Law of Easements (Bennett's 1st ed., in substance (pp. 264 and 265), that if a plan should be shown and annexed to a deed, or referred to in the deed, the vendor would probably be estopped from denying its existence, but "if the plan should be merely exhibited and not referred to, and there should be no reference to it in the deed, it is difficult to see by what precise means the p

become entitled to a right; it scarcely seems there could be any grant implied; for to imply such a grant would be like adding a term to a written contract by parol evidence, nor is it likely that there could be any right by estoppel; for there is nothing in the deed whereby the vendor could be estopped; the probability is, therefore, that the purchaser would acquire no right to a way at all; but possibly he could sue the vendor for damages."

In the case of *Glave v. Harding*, 27 L. J. (N. S.) Com. Law (Exch.), 286, 292, which was expressly referred to on the complainant's brief, it appeared that prior to the lease of the land, some sort of a plan was exhibited showing ways; but the plan was not so referred to in the lease or made a part thereof as definitely to point out the way claimed, or to make it expressly a part of the grant; and the court in concluding its opinion says (p. 292) "The plaintiff's claim to the right of way depending upon the lease, and the position of the premises at the time it was granted, no question of intention can enter into the decision. The right is not granted in terms, nor by implication, as a continuous and apparent easement; therefore it was not granted at all and there was no evidence of it, and the defendant is entitled to a new trial."

In the case of *Squire v. Campbell*, 1 Myl. & Cr. 459, 478, also specially referred to by complainant's brief, which was a bill in equity to enjoin the erection of a statue in an open space in London, which was shown as an open space on a plan exhibited to the lessor before the lease was made, and by which plan it appeared that the space was to be quite open and free from obstructions, it appeared that this portion of the plan was not shown annexed to the lease, nor made a part thereof. The Lord Chancellor in his opinion (p. 479) says: "The Plaintiff's case is not that a provision has been omitted out of the lease, by fraud, misapprehension, or mistake; and it is therefore unnecessary to consider what might be the effect of such a case stated and proved; but his case is that, independently of what was stipulated for by the agreement, and of what was provided for by the deed, a separate and distinct contract arose from the

mere exhibition of the plan. Can there, however, be such a separate contract? There was but one object, and one thing contracted for: the agreement had various terms, but all constituted but one agreement; and if so, then the parol agreement was merged in the written contract, if there was one, and both were merged in the deed." And the court, after an elaborate review of authorities, concludes that the injunction must be dissolved, although suggesting that if the plaintiffs conceive themselves aggrieved, the remedies of the law are open to them. See also *Wells v. Company*, 47 N. H. 235, 253, 254; *Comstock v. Van Deusen*, 5 Pick. 162; 1 Jones on Real Prop. in Conv., §§ 335, 336, 339, 342.

In view of the principles laid down in the foregoing cases, we find that the complainant acquired, by virtue of his deed, no right of way in Conimicut avenue, as shown upon the plat; and that therefore he acquired no equitable right to have the same opened and laid out as shown upon said plat; and that the bill in this cause cannot be sustained.

We therefore find no error in the decree of the Superior Court dismissing said bill, and the same is therefore affirmed.

This appeal is dismissed, and the cause is remanded to the Superior Court, for further proceedings.

James A. Williams, for complainant.

Irving Champlin, James Harris, for respondent.

PAWTUCKET BAKING COMPANY vs. THE RHODE ISLAND COMPANY.

JUNE 19, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Negligence. Rear End Collision. Electric Railway.*

In an action on the case for negligence, arising out of a collision of defendant's car with the rear of plaintiff's covered wagon, while being driven on the car track at about 9:30 P. M., the testimony showed that no bell was rung, but the record did not show whether or not plaintiff looked to the rear for approaching cars, or the rate of speed of the car at the street crossing, or the

distance from the wagon at which the motorman first saw it on the straight track of a quarter of a mile, or that any effort was made to stop the car or whether the head light was burning:—

Held, that from the record the accident appeared to be the result of the reckless act of the motorman in running down plaintiff's wagon which was lawfully on the highway at that time and place.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and overruled.

BLODGETT, J. On February 15, 1906, plaintiff's servant, Henry W. Pierce, was driving a covered baker's wagon belonging to plaintiff on Pawtucket avenue, in the Town of East Providence, going in a northerly direction, about nine o'clock at night. The night was clear, but dark, with no snow on the ground. When about halfway between East Providence Centre and the White Church, on Pawtucket avenue, the wagon was struck by defendant's car, was badly damaged, its contents destroyed, and the horse seriously injured. Plaintiff brought suit to recover damages for the injury to its property aforesaid, and the case was tried to a jury in the Superior Court.

The defendant introduced no evidence and the jury returned a verdict for plaintiff in the amount of \$299.70. The defendant duly filed a motion for a new trial upon the grounds stated in said motion, which motion was denied, and the case is now before this court on exceptions to the decision of the Superior Court denying said motion.

The amount of damages is not disputed by the defendant, its contention being solely that plaintiff's servant was not in the exercise of due care at the time of the collision. As the defendant introduced no testimony, the plaintiff's evidence on the questions of negligence and contributory negligence is undisputed.

The form of action is trespass on the case for negligence, and the single count of the declaration alleges that it was the duty of the defendant "to warn persons upon its tracks, particularly after night-fall, of the approach of its said cars, either by ringing or sounding a gong, whistle or some other equivalent method; and it was further the duty of said defendant corpora-

tion to abstain from running into with its said cars any persons using said highway in a lawful manner upon the day aforesaid."

The testimony of the plaintiff's driver, Pierce, was uncontradicted as to certain matters, viz.: (p. 3) "Q. 31. Was there any bell sounded by the car behind you? A. No, sir." (p. 5) "Q. 34. Are there any cross-roads anywhere near the point where this accident took place? A. Yes, sir. Q. 35. What, describe it to the jury what there is. A. A cross-road that goes right across the avenue. Q. 36. How far from the place where the accident occurred? A. Well, almost right where the road is." (p. 6) "Q. 46. What did you say was the reason why you were occupying the car track? A. The road was awful, ruts on the other side, so it drove me into the track. Q. 47. What is the condition of the track, say both towards Pawtucket and towards East Providence center for a quarter of a mile from the point of the accident, as to straightness? A. It is straight."

- (1) Inasmuch as the defendant offered no defence we thus have presented affirmative testimony showing that the defendant's car collided with the rear of the plaintiff's covered wagon while being driven on the car track at about 9:30 P. M., and that no bell was rung to give warning of the approaching car. The record is silent as to whether the plaintiff looked or did not look to the rear for approaching cars, as it is silent as to the rate of speed of the car at the street crossing in question, the distance from the wagon at which the motorman first saw the wagon on this unbroken stretch of straight track of a quarter of a mile, as also it fails to show that the motorman made any, even the slightest, effort to stop the car at any time or even whether his headlight was burning or not. So far as appears from this record in which the defendant has not seen fit to offer any explanation of the cause of the accident, it appears to have been a reckless act of the motorman in simply running down, from the rear, the plaintiff's wagon which was lawfully on the highway at that time and place, without notice or warning of any kind.

We have carefully examined the several exceptions presented

in the bill of exceptions and overrule them all. The trial justice was clearly right in his instructions and in his refusals to instruct the jury and the defendant's exceptions being thus overruled the case is remitted to the Superior Court for the entry of judgment upon the verdict.

James L. Jenks, for plaintiff.

Joseph C. Sweeney, G. Frederick Frost, for defendant.

ADIN B. HORTON vs. AUGUSTUS F. AMORAL.

JUNE 26, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Trover.*

Plaintiff leased a farm to defendant, under an agreement by which defendant was not to remove any hay or straw from the farm.

Held, that plaintiff had neither title or right of possession so as to enable him to maintain an action for the conversion of the property by defendant, his remedy being for breach of an executory contract.

TROVER AND CONVERSION. Heard on exceptions of plaintiff and overruled.

BLODGETT, J. After verdict for the defendant in this action of trover the plaintiff has presented his bill of exceptions to this court on one portion of the charge to the jury only, viz.: "I have decided that there is but one question here for you to consider and that is this question of the conversion of the lumber. This action is not a proper action to recover for the hay and straw under the circumstances testified to by the plaintiff and his witnesses in this case, so you will confine your attention to the question of the conversion of the lumber."

The plaintiff's exception is thus stated: "The plaintiff takes exception to that portion of the charge in and by which his claim as to hay and straw is excluded from the consideration of the jury."

The property alleged to have been converted by the defendant consisted of certain lumber, some hay and some straw, and no question is raised as to the propriety of the verdict in respect of the lumber. The plaintiff, however, claims that the follow-

ing conversation between his representative, a defendant, at the time of the oral hiring of the hay by the defendant, entitles him to maintain title to the hay and straw admittedly removed from the farm by the defendant during his tenancy. (p. 17) "Q. How long a time did you let it to him? A. I let it to him a year. Q. 12. For what rental? A. \$20 a year. Now what were the terms discussed between Amoral about the way the letting should be? A. He said he was going to put in the hay and straw providing they could be kept everything on the farm and the manure would be considerable help on the farm. A. To keep twenty cows on the farm and he said he would. Q. 15. What were the terms, any, relative to keeping of hay, straw and manure? A. They should be kept on the farm. Q. 16. The agreement between you? A. Yes." (p. 39) "Q. 182. On the basis that you claim the—for hay that belonged to the defendant taken away? A. Yes, that is the agreement. (1) I went there, to have all the hay and the straw and the manure not take none away."

The utmost effect which we can give to this evidence may be conceded that it was made as claimed by the defendant, that the defendant agreed that the hay and straw should be taken away, but should be kept on the farm. But no title was reserved to the plaintiff so that it could be attached as an attachment for the plaintiff's debts, nor are the hay and straw joint owners. We see no evidence creating such a right of possession in said hay and straw in the plaintiff as to enable him to maintain an action for trover and conversion. If the defendant has violated an executory contract in these matters, the plaintiff doubtless has his remedy for such breach of obligation, but it is not in this case.

The plaintiff's exception overruled and case remanded to the Superior Court for the entry of judgment on the verdict.

*Page & Cushing, James F. McCartin, for plaintiff;
Thomas A. Carroll, Walter P. Suesman, for defendant.*

JUNE 27, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Equity Pleading.*

There cannot be answers and demurrers covering the same matters pending at the same time, and after admitting the jurisdiction of the court by filing an answer in an equity proceeding, respondent cannot subsequently demur on the ground that complainant has an adequate remedy at law.

(2) *Equity Pleading. Estoppel by Answer.*

Where a respondent by his answer has admitted the jurisdiction of the court in equity, and has not changed his position until after the statutory period within which an action at law might be maintained against him, he is estopped by his act from thereafter asserting the adequacy of a legal remedy for the complaint.

(3) *Equity. Quia Timet. Dower.*

A bill in equity against an administrator with the will annexed in which the complainant seeks to remove the cloud upon the title to certain property purchased by him from testator as to which the widow did not release dower, and in which she has been awarded dower in the form of an annual life payment, is in effect a bill *quia timet*, of which equity has jurisdiction.

BILL IN EQUITY. Heard on appeal of complainant and appeal sustained.

BLODGETT, J. This is a bill in equity against J. Ellis White as administrator with the will annexed of the estate of William E. Newell, late of Pawtucket, Emily W. Newell, his widow, and Eli S. Newell, a devisee under his will, in which the complainant seeks to remove a cloud upon the title to certain property purchased by him from said William E. Newell in his lifetime as to which said Emily W. Newell did not release her dower and in and to which she now claims, and has been awarded, dower in the form of an annual payment for her life.

The record of the case subsequent to the filing of the bill on February 3, 1909, is as follows: There does not appear to have been any subpcena issued, but on February 19, 1909, the respondents White and Eli S. Newell filed their joint and several answer, in the nature of a cross bill and praying that other per-

sons be made parties to the proceeding. (the widow, Emily W. Newell, filed her separate bill and joins in the prayer of the complaint she "admits all the allegations contained in asks that J. Ellis White, Administrator of the E. Newell, may be decreed by this Honorable court to pay and satisfy said Emily W. Newell, her right of dower in the premises described in the complaint."

On February 20, 1909, complainant filed certain paragraphs on the answer of the respondent and Eli S. Newell, the sole ground being in the passages set forth were impertinent. On January 13 exceptions were heard by the court and both parties then counsel for the respondents White and Newell deceased. Later the present counsel for the respondents entered their appearance and on March 21, 1909, further heard on said exceptions and the motions to the answer were sustained. With the widow, who had joined in the prayer of the complaint above set forth, not excepted to or replied to without a withdrawal of the joint and several bills had been filed by White and Eli S. Newell and to certain parts found to be subject to the objections stated, still stood as to the remainder as valid bill, and without consent of counsel for the respondents so far as the record shows, without a motion to dismiss the cause then stood for hearing on the bill as heretofore filed, leave was then granted to still further amend the pleadings by permitting White to file a new ground that complainant had an adequate reason therefor on December 12, 1910, after hearing on the demurrer only, a decree was filed sustaining the demurrer to the entire proceeding. And from this decree complainant has appealed.

The appeal must be sustained. There cannot be demurrers covering the same matters pending

- (1) that is to say, that, after answer has been filed, it is not proper to demur subsequently and thus to admit and attempt to deny the jurisdiction of the court at one and the same time. Having admitted the jurisdiction of the court by answering, the respondent White now seeks by his demurrer to deny the jurisdiction of the court on the ground that the complainant has an adequate remedy at law. It appears by the record that the complainant presented his claim to the respondent White as administrator, as a legal claim against the estate of said William E. Newell, and that on August 6, 1908, the respondent White denied and
- (2) disallowed the same. Even if respondent's contention were originally correct he cannot now be heard to urge it, inasmuch as by his answer having originally admitted the jurisdiction of the court and not changing that position until after the statutory period within which an action at law could be brought against the administrator, he is estopped by his own act from thus asserting the adequacy of a legal remedy for the complaint.
- ✓ (3) 'This is in effect a bill *quia timet*, and of such bills equity has unquestionable jurisdiction. *A fortiori* is this the case when the complainant has, as here, assented originally to the jurisdiction in equity and has maintained that attitude until all legal remedy (if any adequate legal remedy ever existed) has been barred by the statute of limitations.

The appeal is sustained, the decree of the Superior Court dismissing the bill is vacated, and the case is remanded to the Superior Court with direction to strike the demurrer from the files and for further proceedings.

Littlefield & Barrows, for complainant.

Bassett & Raymond, for respondents.

MALCOLM W. LINDGREN vs. JESSIE L. DOUGHTY, *et al.*

JUNE 27, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

- (1) *Taxation. Building on Leased Land. Lease Unrecorded. Personal Property.*

A building was erected upon leased land, the lease being unrecorded, and was taxed as real estate under the provisions of Gen. Laws, cap. 45, § 2 (now Gen. Laws, 1909, cap. 57, § 2) "buildings on leased land, the leases whereof are in writing and recorded, shall, for the purposes of taxation, be deemed real estate." After levy and sale;—

Held, that the lease never having been recorded the building was not to be deemed real estate, but should have been assessed as personal property and the appropriate proceedings taken for the collection of the tax, and the levy and sale as real estate was null and void.

(2) *Equity. Setting Aside Tax Sale Deed. Defects Apparent on Record.*

Where a tax-sale deed appears upon its face to have been made pursuant to law, as shown by its recitals, which are by statute made "evidence of the facts stated" and it is necessary to resort to extrinsic evidence to show the existence of facts rendering the levy and sale null and void, a bill in equity may be maintained to set aside such deed under the rule that where an instrument is made by statute *prima facie* evidence of the regularity of proceedings connected with the assessment and sale for taxes, equity will set aside such instrument for defects, although such defects are apparent on the face of the proceedings leading up to the execution of the instrument.

BILL IN EQUITY. Heard on appeal of respondents and denied.

PARKHURST, J. This is a bill in equity brought by the complainant Lindgren, claiming that he was the purchaser of a certain leasehold interest in land situate on Broad street, in Providence, the fee of which is in the New York, New Haven and Hartford Railroad Company, subject to an unrecorded lease to one Hiram N. Doughty, dated March 25, 1899; and also as the purchaser of a building on said land which was the property of Elizabeth C. Doughty, the former wife of Hiram N. Doughty, and of various articles of personal property contained in said building. Said leasehold interest and said building and contents were mortgaged by said Doughty and wife by two personal property mortgages to one Sullivan Wilson, one bearing date October 16, 1899, for \$384, the other dated January 3, 1902, for \$200. These mortgages both duly recorded were duly transferred by Wilson to Lindgren, November 12, 1908, and the transfer thereof was duly recorded. On December 17, 1908, said Lindgren, having advertised under the powers of sale contained in said mortgages, sold at public

auction and bought in the property therein described and executed a conveyance thereof to himself.

At said mortgagee's sale, the respondent Jessie L. Doughty, Hiram N. Doughty's present wife, protested against the sale, claiming to own said building by virtue of a deed made pursuant to a tax sale held June 4th, 1903, whereby Franklin P. Owen bought at said sale and received from the city treasurer a deed of the building that was being sold for non-payment of the taxes assessed July 1st, 1902, against Elizabeth C. Doughty; and also claiming under a deed dated December 17th, 1908, the same day as the foreclosure sale, from the heirs of Franklin P. Owen to said Jessie L. Doughty of all interest in and to this building.

The sale was proceeded with and the complainant bought in at the sale all the rights of the mortgagors as granted in and by the said two mortgages, as above stated.

The bill alleges in substance that the conveyance by the heirs of Franklin P. Owen of all the interest in said building conveyed to him by the city treasurer at said tax sale was procured by the said Doughty to be made to his present wife, the respondent Jessie L. Doughty, without consideration; that said Doughty had repaid to said Owen all the money that Owen had advanced to purchase the building at said tax sale, and that Owen had either actually conveyed his interest to Doughty, immediately after the sale, or held the same in trust for said Doughty; that neither said Owen nor his heirs had any real interest therein; and that said Doughty procured said heirs to transfer their apparent interest to his wife, in order to defraud the complainant and deprive him of any interest in said building under his said mortgages. The bill claims that said transfer by the Owen heirs is a cloud upon complainant's title and prays that the same may be declared to be null and void and of no effect, and after hearing upon bill, answer and proof a decree to that effect was entered by the Superior Court, apparently upon a finding by that Court that the charges of fraud in procuring that deed were sustained by the proof.

The case is before this court upon the respondents' appeal from said decree.

Upon examination of the proofs in this opinion that not only said deed from the C said tax sale deed from the city treasurer to were void and of no effect, but for a difference which seems to have led the Superior Court

It appears that the building in question v Elizabeth C. Doughty, the first wife of H and was built upon land belonging to the New and Hartford R. R. Co., and leased to said C as above shown. Said lease was never recorded. Said assessors of Providence appear to have taxed Elizabeth C. Doughty, as real estate, under Gen. Laws, R. I. cap. 45, § 2 (now reenacted R. I. 1909, cap. 57, § 2), which reads as follows: "Buildings on leased land, the leases whereof recorded, shall, for the purposes of taxation, be deemed real estate." And acting upon this, said city treasurer

- (1) to levy upon and sell said Elizabeth C. Doughty said building as real estate, for non-payment of the same the same procedure therein as in other cases. But, as the said lease was never recorded, the building was not to be deemed real estate for the purposes of the statute above quoted; and there was no authority for such procedure, with regard to this building, which was personal property of Elizabeth C. Doughty, for the same purposes, and should have been taxed as such. Said city treasurer, as collector of taxes, should have proceeded as with other personal property, either by distraint or by the provisions of cap. 48 (Gen. Laws, R. I. 1896) § 1, which law as provided in § 26; and the action of the city treasurer in levying thereon and selling the same as real estate was void. It follows, therefore, that said tax-sale deed being null and void conveyed no interest in said land to said Jessie L. Doughty and his heirs got nothing, and therefore their action against said Jessie L. Doughty conveyed nothing to her. Said tax-sale deed does not appear to be void, but appears to have been made pursuant to
- (2)

for the sale of real estate and interests therein, as shown by the recitals in the deed, which are by statute (cap. 48, Gen. Laws, 1896, § 15) made "evidence of the facts stated;" and as it is necessary to resort to extrinsic evidence showing that the lease was never recorded, so as to show that the building was not real estate for the purpose of taxation, it follows that this bill in equity may be maintained for the purpose of setting aside said tax-sale deed as well as the deed of the heirs made pursuant thereto under the well settled rule laid down in 6 Pomeroy's Eq. Jur. § 734, p. 1237, as follows: "In many states, deeds, certificates, and other instruments given on sales for taxes are made *prima facie* evidence by statute of the regularity of proceedings connected with the assessments and sales, and it is well settled that courts of equity will set aside such instruments for defects, although such defects are apparent on the face of the proceedings leading up to the execution of the instrument; or, in a proper case, the execution of such an instrument, *prima facie* valid on its face, will be enjoined." And see *Rich v. Braxton*, 158 U. S. 375, 407 and cases cited; *Stewart v. Cryslar*, 100 N. Y. 378; *Allen v. Buffalo*, 39 N. Y. 386; *Crooke v. Andrews*, 40 N. Y. 547; and other cases cited in note 32.

We are of the opinion, therefore, that the complainant, by his bill and the proofs thereunder, has shown sufficient equity to maintain the bill; and that he is entitled to a decree setting aside as a cloud upon his title both the tax-sale deed to Franklin P. Owen, and the deed from the Owen heirs to Jessie L. Doughty. The parties may submit a decree to that effect, for our approval.

The cause will be remanded to the Superior Court with direction to enter the decree approved by this court.

Dexter B. Potter, for complainant.

Willis B. Richardson, for respondents.

MARY H. HORGAN vs. TOWN COUNCIL OF TOWN OF JAMESTOWN.

JUNE 29, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Town Councils. Defining Lines of Highways.*

A town council even in the absence of statutory authority would have the power, without notice, and in such manner as it saw fit, to survey, bound and mark out the lines of an existing highway, and to take action to prevent encroachments and to remove obstructions upon the same.

(2) *Highways. Dedication. Non-User. Adverse Possession.*

Where a highway has been dedicated to the public, the public right therein is not lost by non-user or by adverse possession however long continued.

(3) *Accretions to Highways to Navigable Waters.*

Where a highway has been laid out to navigable water, this right of access dedicated to the public will attach itself to any extension of the upland at the end of such highway, whether such be an accretion, arising from natural causes or is caused by human activity either rightly or wrongfully exerted, and such right of access to the sea over the new land will not depend upon whether the addition to the end of the highway grew from the upland outward or began in the water and thence was carried to shore. Any obstruction of such way by the erection of a wall separating the filled land from the old travelled way would constitute a public nuisance.

(4) *Accretions to Highways to Navigable Waters.*

Accretions to a public highway terminating at navigable water attach to and form part of the highway.

(5) *Authority to Fill in From End of Highway to Water.*

Provision in a charter that the company shall have the use and enjoyment of any shore or wharves, convenient and sufficient for the purpose, which belong to the state, did not confer authority upon the company to fill in land, at the end of a highway laid out to navigable water, and to acquire any title or interest in such filled land or to obstruct the way of the public to the water.

(6) *Construction of Statutes. Grant of Authority. Extraordinary Authority Not Inferred from Equivocal Language.*

The grant of extraordinary authority to a corporation tending to great public mischief and the destruction of public rights will not be inferred from general and uncertain language in a charter.

(7) *Certified Copies of Land Records. Evidence.*

Certified copies of the public land records of the towns and cities of the state are properly admissible in evidence under the long established practice in this state. Such rule has become a part of our common law.

(8) *Evidence. Recitals in Deeds.*

Where the issue was whether a highway existed between certain lots, recitals in ancient deeds of ancestors of a party to the controversy, in which deeds the grantors bounded the lots upon the highway in question, are competent evidence having strong probative force as to the existence of such a highway.

APPEAL from a decree of a town council defining a highway.
Heard on exceptions of appellant and overruled.

SWEETLAND, J. This is an appeal from a decree of the Town Council of the Town of Jamestown bounding and marking out that certain portion of Narragansett Avenue in the Town of Jamestown which extends easterly from Walcott Avenue to the sea.

On the 11th day of September, A. D. 1908, the Town Council of the Town of Jamestown entered the following decree: "That that portion of Narragansett Avenue extending from Walcott Avenue to the sea be surveyed, bounded and marked out and that Henry B. Tucker, Lewis W. Anthony and Thomas Carr be appointed a committee to survey, bound and mark out said portion of said Narragansett Avenue extending from Walcott Avenue to the sea according to law and that they report to this Council their doings, together with a plat thereof."

The committee duly qualified according to law, and thereafter, on the 28th day of September, A. D. 1908, made its report to the Town Council that it had, pursuant to its warrant, surveyed, bounded and marked out that portion of Narragansett Avenue extending from Walcott Avenue easterly to the sea, as follows: "Starting at a stone bound at the Northeast corner of Narragansett Avenue and Walcott Avenue, so-called; thence across Walcott Avenue in the line of the Northerly side of Narragansett Avenue prolonged 58.7 feet to a stone wall for the point of beginning; thence in said line of said northerly side of said Narragansett Avenue prolonged to the sea or salt water and thence to the harbor line, and bounded Northerly on land of Mary H. Horgan, thence Southerly, bounded Easterly by the sea to the general Southerly line of Narragansett Avenue prolonged easterly to the harbor line; thence Westerly in said general Southerly line of said Narragansett Avenue prolonged to the stone wall at highwater mark and thence in the same direction 163 feet to a point in the westerly face of said stone wall first above mentioned and bounded Southerly, by land of said Mary H. Horgan and thence Northerly along said stone wall to the said Northerly line of Narragansett Avenue prolonged 57.95 feet to the point of beginning. And it is our opinion that no person has sustained any damage by reason of the sur-

veying, bounding and marking out of said portion of said highway. The annexed is an exact draft or plan of the said highway as surveyed, bounded and marked out by us, and it is hereby made a part hereof."

Notice of the time and place of hearing said report was duly given to the appellant according to law. The appellant appeared and was heard relative thereto and thereupon a decree was entered by the Town Council on the 23rd day of November, A. D. 1909, approving the report of the committee and ordering that "said highway be established and laid open by removing all buildings, fences and other impediments thereon." The appellant appealed from this order and decree of the Town Council to the Superior Court for the County of Newport. Her reasons of appeal in substance were, that it was not necessary that said portion of said Narragansett Avenue should be surveyed, bounded and marked out or established and laid open as a highway; that the proceedings of the Town Council in the premises were irregular and not taken in accordance with the statute; that no damages were awarded to her. The cause was tried in the Superior Court before Mr. Justice Brown sitting with a jury. At the conclusion of the testimony the justice presiding directed the jury to return a verdict for the appellee. The cause is before this court on the appellant's exceptions to the direction of a verdict against her and to certain other rulings of the justice made during the trial.

The appellant excepted to the ruling of the justice presiding, denying the appellant's motion to quash the proceeding. This motion was made on the grounds: (a) The town council did not order a highway to be laid out. (b) It did not adjudge the highway necessary. (c) The final decree of the council established a different way from that ordered to be laid out. (d) The committee made no effort to agree with the appellant as to her damages. (e) It did not appear that the committee appointed to make the layout were "suitable and indifferent" men.

The appellant has regarded this action of the town Council as one to lay out a new highway. If such was its nature, the

- proceeding was clearly irregular, open to some if not all of the objections of the appellant, and should have been quashed. It entirely failed to conform to the provisions of Chapter 71, Gen. Laws (1896) now Chapter 82, Gen. Laws, 1909, under which town councils must proceed in laying out highways in the several towns. The claim of the appellee, the Town Council, however, is that it was not disturbing the appellant in the possession of any land belonging to her; that it was not proceeding to lay out a highway under section 1 of said Chapter 71, Gen. Laws (1896), but to survey, bound and mark out a highway already existing; that it was proceeding under section 28 of said Chapter 71, Gen. Laws, 1896, which provides that "town councils may mark out, relay, widen, straighten, change the location or abandon the whole of or any part of any highway or driftway" except certain highways laid out by the General Assembly; "and thereupon like proceedings shall be had in all respects, so far as the same are applicable, including appeals, as are provided in this chapter in case of taking land and ascertaining damages to the owners of lands taken in laying out or in case of abandonment of highways;" that no land of this appellant was taken by this proceeding and that none of the procedure provided in said chapter in the case of taking lands and ascertaining damages to the owners of lands taken is applicable to the situation of this appellant. If the facts in the case warrant the claim of the Town Council then the appellant is not in a position to make the objections to this proceeding which are
- (1) contained in the grounds of her motion to quash. Indeed, a Town Council having the management of the prudential affairs and interests of the town and having the care of the highways of the town, in the absence of special statutory authority therefor would have the power, without notice and in such manner as it saw fit to survey, bound and mark out the lines of an existing highway and to take action to prevent encroachments and to remove obstructions upon the same. The vital question in the case, therefore, is whether any of the land included within the lines of the description contained in the report of the committee belonged to this appellant or was all part of an existing highway. We shall consider this question under the next exception.

The appellant excepted to the ruling of the directing the jury to return a verdict in favor

It appears from the testimony given at the perior Court that at a meeting of the Proprietors Jamestown, held on the 1st day of March, A agreed that the township lots should be laid see next to ye farme of Joseph Morey that he h On the 15th day of March, of the same year a was held at which it was "voted and ordere highway shall be run threwe ye township." of the proprietors held in April, 1709, a committe to lay out the township according to the pr ment. At this meeting it was also voted as fo further order that ye land that shall remain prietor has his just right laid out ye remainder : proprietors & layd out at ye descreson of ye sd sd land shall run from see to see which ye sd lay out of that land a highway fore rod wide country forever and ye remainder of it at ye de committee."

Pursuant to a vote passed at a meeting of held on the first day of May, 1709, a petition General Assembly to be held at Newport on May following, in which it is set forth that the meeting held on the 1st day of March ordered committee of five men "for to lay out a high wide on ye south line of our township land be above sd proprietors from see to see for ye us forever." The petitioners pray that the Ass matter into their consideration & will order & way forthwith to be laid out by ye committe that ye publick benefit of ye Ferrys might be fo Majesties subjects."

The General Assembly received the petition a jury be summoned by the sheriff to lay out the last Monday in said month of May, also that surveyor, attend the jury. On July 7th, 170

chosen by the proprietors to lay out the highway met and the following appears upon their record: "At a meeting of ye committee chosen by the proprietors of said town for ye ordely setting the highways athist ye Island from see to see and having the survayer Mr. John Moumford there and ye plat of ye Island the highway was laid out of fore rods wide and staked out by ye sd committee."

It further appears by the record of said committee that on October 22, A. D. 1709, the committee met, viewed and approved the plat of John Moumford "of ye highways and severall divisions through and in ye township and commonadge land in sd town of Jamestown," which said work was authorized by the whole committee on July 7th. And thereupon after due consideration it was ordered that "the sd returne be put upon record to stand as a finall determination and decision of all differences and disputes for ye future and that application be thereupon made to ye General Assembly at Warwick the twenty-sixth instant for a further confirmation of ye highways and that they give order for their being laid open for ye benefit of her Majtys subjects." At the same meeting the clerk of the committee is directed to prepare a petition to the Assembly relating to the highway accompanied by the plat thereof by John Moumford. A petition was presented to the General Assembly on the 26th day of October, A. D. 1709, and thereupon it was voted "that all persons concerned is to move of there fences of the Highways by 10th day of Decem^r next which if they refuse or neglect to doe accordingly then it shall be lawfull for the wardens or any one of them in sd town to give forth thine ord^r or warr^t to a Constable or Constables to take sufficient aide if occasion require to lay open the sd Highways and to see all other things complayed with or done according to the purport of sd petition."

February 27th, 1710, the General Assembly passed an act declaring its act of October 26th, 1709, to have been a confirmation of the opening of the two highways, viz.: "the highway from ferry to ferry cross the island stated and confirmed by the propri^{ts} and a jury; Runn by Jno Mumford Survay^r and one

other highway that extends through said Island d
att the head of Mackrell Cove."

From these records it is established that in
was laid out of the width of four rods, running
of Jamestown from east to west, from sea to sea
laid out across the land which the proprietors
in common. This highway became known
connecting the ferry to Newport with the one
on the west. It was afterwards named Narra
It still remains the principal highway of the
island of Conanicut.

According to the testimony of old residents c
to about thirty or thirty-five years ago, at the
Narragansett Avenue, the travelled way termi
of a sloping bank elevated a few feet above t
south side of Narragansett Avenue. On the r
avenue the beach was lower and less precipitous
led down to the water, by which cart path sand
the beach. For sixty years, at least, down to th
wharf has extended out from the lot immediat
of the easterly end of the avenue and anothe
immediately to the south of the easterly end
These lots may be referred to as the wharf lots
tide ebbed and flowed between these wharves
the beach which lay at the foot of the bank at
of Narragansett Avenue. Fishermen and other
their boats and hauled them up there; and th
public drew sand from this beach up the cart p
of the travelled way on Narragansett Avenue.
and the wharf lots are now owned by this ap
thirty-five years ago an ancestor in title of the
both lots and wharves, one William H. Knowl
head some distance out in the water, below l
between and connecting the said wharves. Up
of this bulkhead the said Knowles and membe
deposited ashes from steamboats using said wh
carted sand and debris and dumped the same

between said wharves, the bulkhead and the bank at the end of the travelled way of Narragansett Avenue. Other persons also dumped rubbish there and in time of storms the washings from Narragansett Avenue were carried there. Finally this space was entirely filled to a considerable extent by the washings from the gutter in Narragansett Avenue.

It does not appear that, up to the time of the construction of the bulkhead by said Knowles, the owners of either the north or the south wharf lot had made any claim of ownership or right of possession in the land lying between said wharf lots and east of the end of the ordinary travelled way in Narragansett Avenue. Certified copies of the deeds in the appellant's chain of title to the north wharf lot from 1738 to 1804 were put in evidence. In 1804 said lot was conveyed to one Thomas Congdon, who in 1806 became the owner of the south wharf lot also. In the recitals in each of these deeds the existence of the highway is recognized and the lot is described, in slightly varying words, as bounding southerly on the highway leading from ferry to ferry. Certified copies of the deeds in the appellant's chain of title to the south wharf lot from 1751 to 1806 were also put in evidence. In each of these deeds the said lot is described as bounding northerly upon said highway. From 1806, when said Thomas Congdon became the owner of both lots, till 1871 when both lots were conveyed to said William H. Knowles, the said lots were described in all instruments of conveyance as bounding southerly and northerly respectively upon said highway. The last deed in the appellant's chain of title is that of Charles G. Knowles *et al.* to Mary H. Horgan, the appellant, dated October 29th, 1907. In this deed, for the first time, the land between the two wharf lots is included in the description of the premises conveyed, but the following limitation is made upon the covenants of the deed: "But it is expressly understood and agreed that the existence of any highway over any portion of the secondly described parcel of land shall not be deemed or taken to be a breach of any covenant in this deed, either express or implied, provided, however, that nothing herein contained shall be construed as an admission that any such

highway in fact exists." Soon after receiving this deed the appellant built a stone wall along the easterly side of Walcott Avenue, which crosses Narragansett Avenue at about the place where the travelled way formerly ended in said Narragansett Avenue as described by the old residents of the town. This wall prevents access from Narragansett Avenue to the filled land which covers the sloping bank, the beach and the land formerly tide-flowed between Walcott Avenue, as it crosses Narragansett Avenue, and the location of the bulkhead built by William H. Knowles.

The appellant claims that the land east of the present east line of Walcott Avenue was never laid out as a highway; that the purpose of the proprietors in laying out the way was to reach the ferry and not the sea; that the witnesses testify that the ferry operated, within their memory, was reached by turning from the end of the travelled way in Narragansett Avenue to the north or the south onto the wharf lots; and that it is plain therefore that the proprietors never intended to lay out Narragansett Avenue as a highway eastward of the present east line of Walcott Avenue. The records relating to the layout of Narragansett Avenue do not warrant such a conclusion. It does not appear what was the exact location of the ferry in 1709, or whether a public ferry existed on the east side of the island at that time. In the records of the proceedings leading up to the layout of this highway it is sometimes spoken of as running from ferry to ferry. We must find, however, from an examination of the whole record that the proprietors clearly intended to, and that in fact they did, lay out this highway from sea to sea along the south line of their common township land which itself extended across the island from sea to sea; and that this was their intention whatever may have been the location of the public ferry at that time, if there was one.

The appellant also contends in support of her position that the title to the land marked out by the said committee as a part of Narragansett Avenue is in her and was in her grantor by reason of the action of William H. Knowles in building the bulkhead and filling in the area between the wharves; and that

- the land so marked out is not a part of Narragansett Avenue. She regards it as important that the filling was commenced at the bulkhead and proceeded towards the land. It is not clear from the testimony what proportion of the filling was first made at the bulkhead and advanced towards the shore and what part was an extension of the upland towards the bulkhead. In our opinion that is an immaterial consideration. We have already decided that Narragansett Avenue was originally laid out to the sea. The way having been dedicated to the public, the public right in said way is not lost by non-user or by adverse possession however long continued. *Simmons v. Cornell*, 1 R. I. 519; *Almy v. Church*, 18 R. I. 182; *Knowles v. Knowles*, 25 R. I. 325. This right of access to navigable water, dedicated to the public, and not lost by mere non-user, will attach itself to any extension of the upland at the end of said highway, whether such is an accretion, arising from natural causes depositing soil at the end of the highway, or was caused by human activity, either rightly or wrongfully exerted. The existence of this right of access to the sea over the new land will not depend upon whether the addition to the end of the highway grew from the upland outward or first began out in the water and thence had been carried to the shore. There was no right in William.H. Knowles to cut off the way of the public in said Narragansett Avenue to the sea, and there is none in the appellant. Any obstruction of such way would nullify the dedication by the said proprietors, approved by the General Assembly, and would constitute a public nuisance. Furthermore, the title to the upland of Narragansett Avenue was never in this appellant, her grantor or any of their ancestors in title; we fail to see, therefore, upon what principle of law either she or her grantor could claim any title or interest in the accretion at the end of said avenue. That all accretions to a public highway terminating at navigable water attach to and form part of the highway is amply supported by authority. *Hoboken v. Pennsylvania Railroad Company*, 124 U. S. 656; *New Orleans v. United States*, 10 Pet. 662; *Jersey City v. Morris Canal*, 1 Beas. 547; *Newark Lime Co. v. Newark*, 2 McCarter, 64; *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540.
- (2)
- (3)
- (4)

The appellant also sets up a claim of title to the land in question under the Narragansett Bay Company. The Narragansett Bay Company was a corporation organized under the laws of this state. See Rhode Island Acts and Resolves, October 1828, p. 39. This company by its charter was empowered among other things to operate a ferry between Newport and Jamestown. The appellant has laid particular stress upon certain language of section 15 of the act incorporating said company which in part is as follows: "SEC. 15. And be it further enacted that the Company aforesaid, for the purposes aforesaid, shall have the use and enjoyment of any shore or shores, wharf or wharves, convenient and sufficient for the purpose, which belong to the State, and are not in the occupancy of any person or persons entitled by law, and by grant to hold the same."

- On June 18th, 1829, Thomas R. Congdon conveyed to this company a portion of the north wharf lot and the wharf connected therewith, bounding the same "southerly by the main road leading from ferry to ferry cross the island of Conanicut."
- (5) Upon giving up its business this corporation, by deed dated September 16th, 1830, reconveyed this land and wharf to said Congdon. This deed also conveys to the grantee "all our right, title and interest in all the water in the dock south of the wharf hereinbefore described to the southerly line continued from the south side of the road leading from ferry to ferry across the island of Conanicut, it being the intention of the grantor to reconvey to the said Thomas R. Congdon all the property of every description with the rights, privileges and appurtenances thereto belonging or in any way appertaining to the same which said Company received from said Congdon by his two deeds bearing date the 18th day of June in the year 1829."

It is the contention of the appellant that the power conferred by the General Assembly upon the Narragansett Bay Company was transferred to Congdon and came by mesne conveyances to William H. Knowles; that in building the bulkhead and filling between the wharves Knowles was exercising this power; and that now the use and enjoyment of the land filled by Knowles are in her.

It is unnecessary to consider the question as to the authority of the corporation to transfer to Congdon any right of eminent domain which it might have received from the legislature or the further question as to whether there is any evidence of an intention on the part of the company to make such a transfer. We are strongly of the opinion that the company itself did not have authority under its charter to fill this land and to acquire any title or interest therein, or to obstruct the way of the public to the navigable waters of the bay. The language of said charter under consideration is too general and uncertain to warrant a construction which would give such extraordinary authority to the corporation tending to great public mischief and the destruction of public rights. In considering an act of the legislature of New York authorizing owners of lands lying (6) on the East River to construct bulk heads and to fill in front of their land, the court in *People v. Lambier*, 5 Denio, 9, said: "In an act, designed chiefly if not exclusively to subserve individual interests, the words used must leave no doubt that the legislature intended to annihilate or abridge an important public right, before a court should put such a construction upon it as would have that effect. Public burthens are not to be imposed, nor public rights destroyed, by equivocal words or provisions.

"It would be an unusual event, to say the least, for the legislature at any time to cut off access through a public street to an arm of the sea; and it would be truly extraordinary to hold that such would be the effect of general words in an act granting privileges to particular individuals. We cannot suppose such to have been the intention of the legislature in passing the act of 1836. Had such been the design it would have been plainly expressed, and not left to be gathered, if at all, from general and equivocal words or phrases." See also *Hoboken v. Pennsylvania Railroad Company*, 124 U. S. 656; *Barclay v. Howell's Lessees*, 6 Pet. 498; *Jersey City v. Morris Canal*, 1 Beas. 547; *Newark Lime Co. v. Newark*, 2 McCarter, 64.

Upon the testimony in the case, a finding of the jury that the appellant had any title or interest in the land in question,

bounded and marked out by the said committee, would have been entirely unwarranted; and Mr. Justice Brown properly directed a verdict in favor of the appellee.

The ruling of said justice denying the appellant's motion to quash was also without error. The action of the town council was a definition of the lines of an existing highway and the procedure prescribed in Chapter 71, Gen. Laws, 1896, for the lay-out of highways was not applicable to this proceeding.

- (7) The appellant also excepted to the ruling of said justice admitting in evidence certified copies of the recorded deeds in the appellant's chain of title to the north and south wharf lots, in which deeds the grantors have bounded the lots respectively granted, upon the highway in question. The appellant objects to the introduction of these deeds upon the grounds that there is no statutory authority for the admission of such evidence; and also that the recognition of the existence of the said highway by her ancestors in title in the wharf lots should not be admitted as admissions contrary to her claim to the land lying between said wharf lots. The appellant takes nothing by these exceptions. Statutory authority is not required for the introduction in evidence of certified copies of the public land records of the towns and cities of the state. The admission of such copies is in accordance with the long established practice of the courts of this state. Such public records are open for inspection and if by chance there should be an error in a certified copy thereof produced in court, such error would be readily noted and corrected. To require that the records themselves should be removed from their place of custody and produced in court would result in great inconvenience to the public. The rule admitting such copies in evidence has become a part of our common law. It is a rule very generally adopted by the courts of the several states and is supported by a long line of authorities. The objection of the appellant to the introduction of these deeds for the purpose of showing a recognition of the existence of the highway in question by her ancestors in title is without force. The issue before the jury was whether a highway existed between the wharf lots to the east of the east line of
- (8)

Walcott Avenue. The recitals in these ancient deeds executed and recorded from the middle of the eighteenth century till about thirty years ago are competent evidence, having strong probative force, as to the existence of a highway running to the sea and not terminating at some point short of the sea as the appellant contends.

In the case of *Morris v. Callanan*, 105 Mass. 129, the court said: "The ancient deed made more than fifty years ago of lands described therein as bounding on an old ditch dividing the inward and outward commons was competent evidence (although neither of the parties to this action claimed under it) in connection with other evidence that the boundary line between those commons was an ancient ditch to prove the location of that line."

In the case of *Randall v. Chase*, 133 Mass. 210, the court held that a certified copy of a deed made more than thirty years before was rightfully admitted in evidence for the purpose of proving the location of a way in controversy, even if neither of the parties to the controversy claimed under it or claimed under the parties to it.

All of the appellant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter its decree in confirmation of the said order and decree of the Town Council of the Town of Jamestown.

Frank F. Nolan, Comstock & Canning, Patrick P. Curran,
for appellant.

Sheffield, Levy & Harvey, for appellee.

ALFRED CURTIS vs. NEW YORK, NEW HAVEN, & HARTFORD
R. R. Co.

JUNE 26, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Evidence. Photographs.*

Photographs of places and things for the purpose of aiding the jury in applying the facts proved to the particular case, are admissible.

(2) *Railroads. Signals.*

Section 3787, General Statutes, Connecticut, provides engine on a railroad shall commence sounding the bell when the engine is approaching and is within eighty rods of the road crosses any highway at grade and shall keep continuously sounding until such engine has crossed such highway. Request to charge that "If the jury find that the witness whistling post for the Union street crossing and the engine sounding occasionally as the train approached the crossing and the defendant performed its whole duty, there being in evidence no circumstances making it necessary for the defendant to do more." *Held*, properly refused since it neither conformed to the law nor the construction placed upon it by the Supreme Court in *Tessmer v. R. R. Co.*, 72 Conn. 208.

(3) *Railroads. Signals.*

Request to charge "The jury cannot find the defendant negligent on the ground that the whistle was not again sounded between the crossing for Union street crossing and the crossing itself after the whistle had been blown."

Held, properly refused since it did not contain the further charge that the whistle was kept occasionally sounding until the engine had passed the crossing.

(4) *Railroads. Negligence. Signals.*

Evidence considered, and while conflicting, there being no supporting plaintiff's contention that defendant did not give the statutory signal, and conflicting evidence to the contrary, the verdict for plaintiff having the approval of the jury, will not be disturbed.

TRESPASS ON THE CASE for negligence.
Verdict for defendant and overruled.

JOHNSON, J. This is an action of trespass and negligence brought by Alfred Curtis, of the City of New York, against the New York and Hartford Railroad Company, to recover damages for injuries to his person and property suffered as the result of a collision between a train of the defendant and a team of the plaintiff, at the Union street crossing in said city.

It appears from the evidence that on the 16th day of December, A. D. 1908, the plaintiff drove with a team through South street, a public highway in said city, across the tracks of the defendant and proceed

of South and Union streets, where he turned to the left to cross the tracks of the defendant on Union street.

South street and Union street, two adjacent streets, run practically north and south, gradually converging until they meet just north of the railroad track, in the vicinity of Cole's grain mill. As they do not meet until they cross the track to the north, there are two plank crossings, the centers of which are 70 feet apart on the main track. There is a siding or spur track north of the main track, which extends some distance to the west, and for some distance east of the crossing. East of the crossing is a covered railroad bridge, distant from the center of Union street crossing 525 feet. Farther to the east is a whistling post for this crossing, which is distant from the center of South street 1,295 feet, and distant from the center of Union street, 1,365 feet. 150 feet nearer to the Union street crossing than the whistling post is the Omo Manufacturing Company, situated to the left of the track as one approaches the covered bridge. 807 feet farther east than the whistling post is the New England Enamel Company. This brings the whistling post between the Omo Manufacturing Company and the New England Enamel Company. The railroad to the east of the crossing curves approximately four degrees. South street and Union street, after meeting north of the railroad, extend down a grade to the left and right of Cole's grain mill, respectively. The extension to the right of Cole's mill is called the River road, and crosses the Summer Creek by means of a bridge. This bridge is distant from the Union street crossing perhaps 75 or 100 feet. North of the main track and spur track, and just east of the South street crossing, there is a storehouse owned by Cole's mill, into which grain is unloaded from cars which are put on the spur track for that purpose.

The plaintiff's declaration is in two counts, the first charges negligence because of the high speed of the train and failure to give a proper warning of its approach. The second count is based on the statutory obligation that requires the defendant to blow its whistle within eighty (80) rods of a grade crossing, and keep the whistle or bell on the engine occasionally sounding until the highway is passed.

The court at the trial to the jury, under Supreme Court of Connecticut, in the case *v. N. Y., N. H. & H. R. R. Co.* 72 Conn. : grounds of recovery except the question of part of the defendant to comply with the s State of Connecticut with reference to the duty the whistle and ring the bell.

The case was tried before Mr. Justice Stee the 13th, 14th, 15th, 16th and 17th days of and a verdict was rendered for the plaintiff eighteen hundred (1800) dollars.

The defendant duly filed its motion for a following grounds:

1. The verdict is against the law.
2. The verdict is against the evidence and of.
3. The verdict is against the law and the weight thereof.
4. The defendant has discovered new and which it had not discovered at the time of the and which it could not have discovered at exercise of reasonable care.

Said motion was argued before Mr. Justice denied. The defendant then filed its bill of the same was allowed by the court as follows:

"1. To a ruling of said justice, at said trial introduction of photograph 'Y,' marked I 'C,' as appears on page 122 of the transcript in said case, filed herewith.

"2. To the refusal of said justice, at said verdict for the defendant, as appears on page script.

"3. To the refusal of said justice, at said defendant's first request, as appears on page said transcript.

"4. To the refusal of said justice, at said defendant's fifth request, as appears on page script.

"5. To the specific instructions given by the court to the jury, at said trial, said instructions appearing on pages 373, 374 and 375 of said transcript, the exception thereto appearing on page 374 of said transcript.

"6. To the decision of said court denying the defendant's motion for new trial on the ground that the verdict is against the law.

"7. To the decision of said court denying the defendant's motion for new trial on the ground that the verdict is against the evidence and the weight thereof.

"8. To the decision of said court denying the defendant's motion for new trial on the ground that the verdict is against the law and the evidence and the weight thereof."

¶ The case is before this court on said exceptions.

- (1) The first exception is to the admission in evidence of a photograph "Y," marked plaintiff's exhibit "C," as appears on page 122 of the transcript of testimony. Defendant's counsel objected because certain cars appeared in the photograph which were not the same cars or in the same place as on the day of the accident. On page 122, the court said: "I think I will allow that and I will have it covered over, if you want, and note your exception to its allowance." Mr. SWEENEY: "I don't think any good would be done by pasting something over." THE COURT: "I will admit it."

In his charge to the jury the court said (p. 350): "When, at the time the photograph generally showing the bridge there, etc., was offered, I cautioned you that there was a car represented there which was not there at the time of the accident and that you are not to take that into consideration in figuring on the question of liability, that the photograph was simply introduced for the sake of illustrating the general layout of the land, and curve of the track, the railroad bridge and the slope of South street I believe is there."

The admission of photographs of places and things for the purpose of aiding the jury in applying the facts proved to the particular case, is a matter of almost everyday occurrence in the courts. We think we have not before been called upon

to pass directly upon the question. The photographs in evidence is however well established; and is supported by numerous cases in Utah. Thus, in *Dederichs v. Salt Lake City R. Co.*, 802, 807, the court by Miner, J., speaking as concluded by the court below, said: "These photographs exhibited the surface condition of the streets, but the railroad track, poles, and distances, and would present to the minds of the jury a better image of the accident and its surroundings, concerning which no oral description was offered, than any oral description. The photographs a faithful representation of the locality was shown to the jury at the time of the accident. We think it must be established that photographic scenes are admissible as appropriate aids to the jury in applying the facts it relates to persons, things, or places. It is the rule, applied in every-day practice in courts, that maps illustrating the scenes of a transaction and the location of objects, if proved to be correct, are admissible in evidence, in order to enable the court or jury to apply the established facts to the particular case. It is difficult to see why a plain picture or representation by the art of photography is not admissible if verified as a correct representation of the facts. If a difference had arisen concerning the photographs taken at a different season of the year, it could have been shown. See *Johnson v. U. P. R. Co.* (Utah) 100 Pac. 690; *Green*, 157 Mich. 690; *Alberti v. N. Y. L. E. & W. R. Co.*, 6 L. R. A. 765; *Com. v. Robertson*, 162 Mass. 162, collected in note to *Dederichs v. Salt Lake City R. Co.*, *supra*.

The admission of the photograph was proper. The explanation and caution given to the jury were sufficient. The rights of the defendant were further sufficient.

- (2) The third exception is to the refusal by the court to grant the defendant's first request to charge the jury at page 347 of the transcript, as follows: "If the

whistle was blown at the whistling post for Union street crossing, and the bell on the engine kept sounding occasionally as the train approached the crossing, then the defendant performed its whole duty, there being in evidence no exceptional circumstances making it necessary for the defendant or any of its servants to do anything further, and the verdict therefore should be for the defendant."

The court had instructed the jury that the law of Connecticut governed the case, and had read to the jury sections 3786 and 3787 of the general statutes of Connecticut, revision of 1902: "SECTION 3786. Every engine used upon a railroad shall be supplied with a bell of at least thirty-five pounds weight and shall have a steam whistle, which bell and whistle shall be so attached to said engine as to be conveniently accessible to the engineer, and in good order for use.

"SEC. 3787. Every person controlling the motions of an engine on a railroad shall commence sounding the bell or whistle when such engine is approaching and is within eighty rods of the place where the railroad crosses any highway at grade and shall keep such bell or whistle occasionally sounding until such engine has crossed such highway."

The court had also quoted from the opinion of the court in *Tessmer, Admr., v. New York, New Haven & Hartford Railroad Company*, 72 Conn. 208, construing said statute, as follows: "The practical construction put upon section 3554 (which is the same section as Bells and Whistles) has been that of common sense, that the whistle shall be sounded at the eighty rod point, and the bell shall be rung thereafter until the engine passes the crossing."

The request is faulty. The words "and the bell on the engine kept sounding occasionally as the train approached the crossing," are not equivalent to the words of the statute, "and shall keep such bell or whistle occasionally sounding until such engine has crossed such highway," or to the language of the Supreme Court of Connecticut in the *Tessmer* case construing said statute: "that the whistle shall be sounded at the eighty rod point and the bell shall be rung thereafter until the engine passes the cross-

ing." The words, "until the engine passed" needed in the request in order to comply with down in the *Tessmer* case. The request was:

- (3) The defendant's fourth exception is to the request to charge the jury as appears on page script, as follows: "The jury cannot find the defendant negligent on the ground that the whistle was blown between the whistling post for Union street crossing itself after the regular crossing was blown."

The court had charged the jury (pp. 10, 11): "The defendant is bound to blow its whistle at the crossing and ring its bell occasionally, or at least occasionally, from the time the first signal whistle crossing is passed. That is the positive duty imposed on the defendant by the statute and which they must perform by a single ringing of the bell of the locomotive when the crossing is reached, the test required by the law."

"MR. SWEENEY—Will your Honor note any part of this specific request which has to do with the blowing of the whistle?"

"THE COURT—If there is any misunderstanding, Gentlemen, the statute provides that the locomotive whistle, either one, shall be occasionally sounded when the first locomotive whistle is blown, 80 rods from the crossing. If the railroad company, having given its locomotive the option of either blowing their whistle or ringing their bell occasionally. If they do either one or the other, they have discharged their duty under the law of Connecticut places upon them. Does that point?"

"MR. SWEENEY—No, it does not. It is not the duty of the Connecticut court has construed that statute as requiring the whistle at the whistling post and after passing the whistling post and ringing the bell occasionally and the Court has especially no duty incumbent on the railroad company after passing the whistling post."

"THE COURT—That is true, but if they ring the bell and they have the option of doing one or the other. There is no claim here that they did blow the whistle after leaving the whistling post. They claim that they blew the whistle at the whistling post 80 rods away, and after that time they rang the locomotive bell until they got to the crossing. If that is true then they have sustained the duty which is cast upon them."

It would have tended to confuse and mislead the jury to give the instruction in the exact words of the request, and the court could not properly give it without referring also to the ringing of the bell. The statement is not true that "the jury cannot find the defendant negligent on the ground that the whistle was not again sounded between the whistling post for Union street crossing and the crossing itself after the regular crossing whistle had been blown," unless there is coupled therewith the proviso that the bell was kept occasionally sounding until the engine had passed the crossing. The court had properly instructed the jury. The request was properly refused.

The fifth exception is covered by what has been said as to the fourth.

We pass now to the consideration of the remaining exceptions.

The court, under the decision of the Supreme Court of Connecticut in the *Tessmer* case, had eliminated all grounds of recovery except that of failure on the part of the defendant to comply with the statute of Connecticut with reference to the duty of blowing its whistle and ringing its bell when approaching a crossing at grade. Upon this question there was some conflict of testimony.

- (4) Edward T. Ball, called by plaintiff, testified, p. 47 of the transcript: "Q. 35. Now where did you first see that train? Ans. I see it just before it came through the railroad bridge. Q. 36. Do you mean by that, the covered bridge? Ans. Yes, sir. Q. 37. Now, from the time—during the time you were there did that train, to your knowledge, blow any whistle or ring any bell? Ans. No, sir, it didn't."

John Holt, a witness called on behalf of the plaintiff, testified,

transcript pp. 69, 70, that he saw the train a
from the enamel shop up to where the accide
testified (pp. 71-2): "Q. 45. Now, after
bridge, did you hear any whistle blow, or
given? Ans. Signal on the crossing. Q. 4
that signal given with reference to the tim
Ans. Why, just as he was on the crossing
who was on the crossing? Ans. Mr. Curtis
which crossing? Ans. Union street crossi
struck." Mr. Holt continued (p. 72): "C
Mr. Curtis when the first signal you heard
What signal do you mean, from the train
From either the train or the crossing. A
signal I heard from the train was the whi
clear down to the Enamel Shop. I don't
Curtis was then. Q. 54. I mean, after the
the covered bridge. Ans. I know Mr. Curtis
when I heard the gong to the crossing. Q
not that was the first signal you heard giv
left the covered bridge? Ans. Yes."

Peter Melien, a witness called on behalf
p. 92 testified as follows: "Q. 44. Did you
blow that day? Ans. No, sir. Well, I
Q. 45. Where was it above? Ans. Up with
Q. 46. Up at the other shop? Ans. The O
Q. 47. From that time until your attention
accident, did you hear any signal of any k
didn't. Q. 48. Did you hear any whistle
sir. Q. 49. Any bell rung? Ans. No, sir.
of any kind? Ans. I didn't hear. Q. 51
good? Ans. It is supposed to." On cross
testified that he saw Mr. Curtis on the Sou
He was asked, p. 92, "C. Q. 53. On the
heard, at that time, the electric bell on the c
you not? Ans. I couldn't say, I say, exact
did. Of course I had a team on the bridge
couldn't say exactly. C. Q. 54. Do you rem

that gentleman sitting over at the table? Ans. I said I think I heard bells, but I was not sure. C. Q. 56. What bell did you mean? Ans. Electric bell. C. Q. 57. Didn't you tell that gentleman over there,—Mr. Phillips,—that you heard the electric bell ringing on the crossing? Ans. Not for sure. C. Q. But you think you did? Ans. I think I told,—for sure. C. Q. 59. What is that? Ans. I might hear it, I say, and I say that now. C. Q. 60. I just want to be sure about it. You don't mean to say that it was not ringing? Ans. No, I ain't saying it was ringing, and I ain't saying it was not ringing for sure. C. Q. 61. Don't you think it was ringing, as a matter of fact? Ans. I didn't say either way. I ain't sure either way. C. Q. 62. Well, now, with regard to this conversation you had with Mr. Phillips, didn't you tell him—Ans. I told him I warn't sure what bell rung. C. Q. 63. Then, I understand you to say you didn't tell him, in so many words, that it was ringing? Ans. (No answer). C. Q. 64. Please answer? Ans. I didn't. C. Q. 65. You didn't? Ans. I told him same way as I do now. I had trouble with my team. I didn't see any ways—.”

Alfred Curtis, plaintiff, called as a witness, testified (transcript p. 140): “Q. 25. As you approached South street, what did you do if anything? Ans. Well, I looked for a train. I knew it was some near. Q. 26. And what did you do to look for the train? What did you do? Ans. I looked and listened both ways. Q. 27. How far were you from the track when you did that? Ans. I was most to the track. I could not tell exactly. Right close by. Q. 28. Did you see any train? Ans. No, sir. Q. 29. Did you hear any whistle? Ans. No, sir. Q. 30. Did you hear any signal of any kind? Ans. Nothing of any kind; no, sir. Q. 31. What did you do then? Ans. I passed down the descent and swung round to go on Union street. Q. 32. You swung around to go on to Union street? Ans. Yes, sir. Q. 33. As you approached Union street what d'd you do? Ans. I looked for a train. Q. 34. Did you see any? Ans. No, sir. Q. 35. What track did you cross first? Ans. I crossed that track that had the freight car on, box car. Q. 36. When you got across that track, what

did you do? Ans. I looked and listened for a train. Q. 37. Did you see any train? Ans. No, sir. Q. 38. Did you hear any train? Ans. No, sir. Q. 39. Did you hear any signal? Ans. No, sir. Q. 40. Where were you when you first saw the train? Ans. My horse was on the track and I was,—my forward wheel was just coming on the track."

Robert Johnson, whose deposition was taken on behalf of the plaintiff, testified (transcript pp. 185-6), that he was standing about six feet from the corner of Cole's Mill, sorting over bags: "Int. 46. Before you went in did you hear the train blow at any place? A. Yes, sir, I heard the train whistle, I should judge between the Omo and the New England Enameling Company she whistled. Int. 47. And by the New England Enameling Company do you mean the tin shop? A. Yes, sir. Int. 48. How much whistle did it give? A. Why, she whistled, I don't know how much—one whistle I should judge. Int. 49. One whistle? A. She whistled one time, that is all. Int. 50. And that was where? A. Between the Omo and the New England Enameling Company. Int. 51. From that time on until after you saw Mr. Curtis hurt did the train whistle again? A. No, sir; I didn't hear it. Int. 52. Did any bell on the engine ring? A. I didn't hear it." He went in the mill when the plaintiff was stopped on Union street about two feet from the crossing. Just as the plaintiff stopped the electric bell rang. In cross-examination, when asked if he did not remember hearing the bell on the engine ring, he answered, "I don't remember, you know, because I never paid no attention,—never thought no accident was going to happen—it may have rung for all I know, but I didn't hear it."

The defendant called Robert McKeon as a witness to testify as to the ringing of the bell. On p. 219 of the transcript he testified on the direct. "Q. 46. In regard to the bell on the engine, Mr. McKeon, will you tell us whether or not you heard that? Ans. Very plainly, distinctly."

John F. Dovin, called as a witness by the defendant, testified, on p. 238 of the transcript: "Q. 35. I will ask you with respect to hearing any signals on the train? Ans. Yes, sir.

Q. 36. What was it you heard? Ans. I heard the whistle. Q. 37. Did you hear anything else? Ans. The bell. Q. 38. With regard to the electric bell on the crossing, did you hear that? Ans. Yes, sir. Q. 39. With reference to bell on the engine? Ans. It was ringing all right."

Joseph Hildenbrund, called as a witness on behalf of defendant, testified (pp. 254, 255 of transcript): "Q. 22. (By MR. SWEENEY). A short time prior, Mr. Hildenbrund, a short time prior to the occurrence of this accident did you hear any signals given by any train? Ans. I did. Q. 23. What were these signals? Ans. I heard the first and the whistle at the Enamel Company. Q. 24. At the Enamel Company? Ans. Yes, sir. Q. 25. Did you hear any other whistle? Ans. I heard another whistle before he comes to the bridge, the covered bridge. Q. 26. You did? Ans. Yes. Q. 27. In reference to the place where the second whistling occurred, was that near the Omo Manufacturing Company? Ans. That is the Omo Manufacturing Company. Q. 28. Near the Omo Manufacturing Company? Ans. Yes. Q. 29. Now, with regard, Mr. Hildenbrund, to the electric bell on the crossing, did you hear that? Ans. Yes, sir. Q. 30. And when did you hear it? Ans. The second whistle and the bell stopped ringing at the same time. Q. 31. The same time you heard the second whistle? Ans. Yes sir. Q. 32. You had been sitting outside the mill, I believe? Ans. I had. Q. 33. Then you went into the mill? Ans. I went in the mill when the train passed me, going to the mill, the boiler room. Q. 34. Now, what I am getting at, Mr. Hildenbrund, is this: You were seated outside, outside the mill, were you? Ans. Yes, sir. Q. 35. And then you went inside the mill? Ans. Yes, sir. Q. 36. Now, how soon after going inside the mill did you,—or, did you hear anything after going inside the mill? Ans. I was in one second and the train stopped quick. I ran out."

George Deacon, called by the defendant, testified he was the engineer on the train, and on p. 318, transcript, testified as follows: "Q. 56. Now, Mr. Deacon, with regard to the bell on the engine after passing the whistling post to the Union street

crossing, what have you to say to that? Ans. The bell was ringing. Q. 57. And continued to ring as you approached Union street crossing? Objected to; objection sustained."

The fireman, Jeremiah J. Deneene, however, testified, p. 327, transcript,—“Q. 7. Now, Mr. Deneene, when passing the whistling post for the Union street crossing, what, if anything, did you hear, or what, if anything did you do? Ans. I heard him blowing the whistle for the crossing. I was up with the string ringing the bell. Q. 8. As you continued to approach Union street crossing,—with regard to the ringing of the bell? Ans. I continued ringing the bell all the way.”

Henry A. May, called as witness on behalf of the defendant, testified he was a baggage master, and on p. 334 of the transcript says: “Q. 11. Now, Mr. May, on the accident in question, passing the whistling post for Union street crossing what, if anything, do you remember in regard to any signals? Ans. I remember the engineer blowing the crossing whistle. Q. 12. And as the train approached Union street crossing, what if anything do you remember in regard to the engine bell? Ans. The bell was ringing.”

Daniel C. White, the conductor of the train testified (p. 338): “Now, Mr. White, in passing the whistling post for Union street crossing, will you tell us what, if anything, you heard in respect to signals? Ans. I heard the customary signals given that day. Q. 6. What are the customary signals? Ans. The grade crossing, south of the bridge, ringing the bell.”

William F. Octerberg, a brakeman, called on behalf of the defendant, testified (transcript p. 342): “Q. 7. And as the train continued to approach Union street crossing, what if anything have you to say in regard to the engine bell? Ans. I heard the bell.”

From the testimony of the defendant's witnesses, and some of those for the plaintiff, it appears that the defendant substantially performed the duty imposed upon it by the statute, so far as the blowing of the whistle at the whistling post was concerned. Upon the question of its performance of the duty to sound the whistle or ring the bell occasionally after passing

the whistling post, until the engine had passed the crossing, the evidence is conflicting. The plaintiff testified that he heard no bell or whistle. Bell testified that from the time the train passed through the covered bridge it blew no whistle and rang no bell. Holt testified that he heard the whistle down at the Enamel Shop and that after the train left the covered bridge the gong on the crossing was the first signal he heard. Melien heard the whistle up at the Omo Manufacturing Company and from that time did not hear any other signal until the accident. As to whether he heard the electric bell on the crossing ringing when the plaintiff was on South street he was uncertain, and said in regard to his conversation with Mr. Phillips: "I told him I warn't sure what bell rung." Johnson heard the whistle between the Omo Manufacturing Company and the Enamel Works; did not hear the whistle again and didn't hear the bell on the engine ring. On cross-examination, he said: "I don't remember you know, because I never paid no attention, never thought no accident was going to happen—it may have rung for all I know, but I didn't hear it." Of the witnesses for the defendant, Hildenbrund heard one whistle at the Enamel Company and a second one at the Omo Manufacturing Company. He heard the electric bell on the crossing and it and the second whistle stopped at the same time. McKeon, Dovin, Deacon, May and Ochterberg all testified that the engine bell rang. White, the conductor, said that he heard the customary signals, and that the customary signals were: "The grade crossing, south of the bridge, ringing the bell." None of these witnesses stated where or when the bell was rung, the nearest approach to such statement being that it was as the train approached the Union street crossing. Deneene, the fireman, however, testified that he continued ringing the bell all the way. He was the only witness for the defendant who testified to such continued ringing of the engine bell.

The defendant's contention is that it performed the duty imposed upon it as to the giving of the signals required by the statute, and that the plaintiff was guilty of such contributory negligence as to preclude a verdict in his favor. Although the

evidence was conflicting there was substantiating the plaintiff's contention that the defendant failed its duty of ringing the bell upon the engine approaching the crossing and until the engine stopped. There was also evidence, both *pro* and *con*, upon the question of the exercise of due care by the defendant upon the track.

Defendant's motion for the direction of a verdict in favor of the defendant was properly denied.

The jury found for the plaintiff. The judge set aside the verdict and heard the testimony has denied the motion for a new trial. In these circumstances this court will affirm the verdict.

The defendant's exceptions are overruled. The case is remitted to the Superior Court with costs to the plaintiff upon the verdict.

*Lyman & McDonnell, Charles S. Hamilton
Joseph C. Sweeney, Eugene J. Phillips, for*

GEORGINA MONAST vs. MANHATTAN LIFE INSURANCE CO.

MAY 25, 1911.

PRESENT: DUBOIS, C. J., JOHNSON, PARKHURST, AND

(1) *Life Insurance. Payment of Premiums by Third Party.*

A life insurance policy is not void because the premium was paid by someone not the assured or beneficiary or by one having no interest in the life of the assured, whether or not he paid the premium, if he was named as beneficiary or that he could collect upon the policy notwithstanding binding upon the company which was made to its terms on death of assured.

(2) *Life Insurance. Rescission. Lapse. Recovery of Premium.*

Where payments were made on a life insurance policy by the agent of the assured and also the agent of a third party claimed to have paid the premiums under the belief that he was the beneficiary in the policy, such policy being a valid obligation so long as the premiums were paid and having been paid.

plaintiff made known to the company any claim of right thereunder, plaintiff had no right of rescission and no claim to recover any premiums paid by her.

(3) *Life Insurance. Insurance Broker. Agency.*

An insurance broker is ordinarily one who is engaged in the business of procuring insurance for such persons as apply to him for that service. He is usually the agent of the insured and though under special circumstances he may be the agent of the insurer the mere fact that he receives a commission from the insurer for placing the insurance with him does not change his character as agent of the insured, and where the regular agent of another company entered into an agreement with the sub-agents of defendant company to turn over surplus business to them for a share of their commissions he was acting purely in the capacity of a broker.

(4) *Life Insurance. Insurance Brokers. Agency.*

The regular agent of an insurance company entered into an agreement with the sub-agents of defendant company, to turn over surplus business to them for a share of their commissions. He was not known to the defendant or to their general agents and it did not appear that the sub-agents had any authority to employ agents.

Held, that he was not the agent of defendant in any sense except possibly to deliver policies entrusted to him by the sub-agents and collecting the first premiums thereon, and defendant was not responsible for his conduct in misrepresenting the contents of a policy, or in misstating the law as to insurable interest, to a person who as a result paid premiums on a policy issued to a third person in the belief that she was the beneficiary under such policy, and that such premiums so paid could not be recovered from the company.

(5) *Life Insurance. Claim to Proceeds of Policy. Notice.*

Policies issued upon the life of assured on his own application, payable to his personal representatives, are valid contracts, entitling the administrator to payment on proof of loss, and the fact that a person who had paid the premiums under the belief that she was the beneficiary notified the general manager of the company after death of assured that she had paid the premiums and had held the policies and claimed to be entitled to some or all of the money, was no more than notice of her claim against the estate for reimbursement or claim to the proceeds of the policies at variance with their terms, and the company was justified in making payment to the beneficiary named in the policy.

(6) *Life Insurance. Rescission. Laches.*

Where through the misrepresentation of an insurance broker plaintiff paid premiums on an insurance policy under the belief that she was the beneficiary, and had actual notice from the broker at least a year before death of assured that she was not named as beneficiary therein and further notice more than two months before death of assured to the same effect from other sources, by waiting until the death of assured and the absconding of the broker before making her claim to the company and by permitting the policy

to get into the hands of the person lawfully entitled plaintiff had at any time any rights in the policy, her to rescind or to maintain any claim against the paid by her for premiums.

(7) *Rescission. Laches.*

Rescission for fraud or mistake is a purely equitable right with great promptness after discovery of the truth and when the other party can be placed in *statu quo*. If having knowledge of the facts the position of the other the right to rescind is lost.

ASSUMPSIT. Heard on exceptions of counsel retained.

PARKHURST, J. This is an action on the contract for money had and received, brought for recovering back certain premiums alleged to have been paid by the plaintiff to the defendant on an insurance on the life of Arthur J. Marchant, her nephew by marriage. It was tried before the Superior Court for the counties of Providence and Pawtucket, sitting without a jury, on the twenty-ninth day of March 1909, and the ninth and tenth days of May. The defendant filed a few days after the trial a motion for judgment which the judge decided that the plaintiff was entitled to recover of the defendant all the premiums which she had paid by the defendant upon these policies, amounting to twelve hundred forty-one and $90\frac{1}{100}$ dollars.

To this decision and the conclusions of law reached which it was based the defendant duly excepted, claiming that it was against the evidence and conclusions of law, and that the damages were excessive; and a motion for a new trial covering the exceptions so taken, and for judgment notwithstanding the verdict taken in the course of the trial of the case, was granted by the Superior Court, together with a new trial on the evidence. The questions before this court are whether the decision is supported by the evidence and whether the rulings excepted to by the defendant constitute reversible error.

The principal facts of the case are that the plaintiff in the fall of 1902 went to call on

Mary C. Marchant, mother of A. J. Marchant, the assured. There she met these two and also an insurance agent named Brophy, who was a duly appointed agent of the Metropolitan Life Insurance Company, having an office in the city of Providence. Mrs. Marchant began to talk about life insurance and said she wanted to have her son's life insured. The son said to the plaintiff, "If you have my life insured, I will have yours" and she said, "All right." She signed no application then or at any other time.

About a week or two after that interview Brophy came to her with two policies on the life of A. J. Marchant, which he told her were, one for Five Thousand Dollars (\$5,000) in the Manhattan Life Insurance Company and the other in the Metropolitan Life Insurance Company. He told her, as she says, that these policies were made payable to her. Plaintiff was not satisfied to take Brophy's word as to the beneficiary in the policies, and, being unable to read herself, she had a niece of hers read them and was told by her that she, the plaintiff, was named as beneficiary.

The plaintiff kept these policies and did not have them read to her again until about two months before the death of the assured, supposing, as she said, that they were payable to her. She says she paid the premiums every year for five years to Brophy, on the Manhattan Life Insurance policy, and took receipts from him, which must have been his personal receipts and not official receipts of the company. What amounts she paid or what Brophy did with the money was not shown, except as to the last payment, which was made by a check, payable to the Manhattan Life Insurance Company, which was for \$201.90, the amount of the annual premium on a policy which was actually issued by that company on the life of A. J. Marchant, dated October 15, 1902, and made payable to his executors, administrators or assigns and actually paid to the administrator of his estate upon surrender of the policy and proof of his death in the spring of 1907. This check was shown to have been received and endorsed by E. A. Dunham, the New England manager for the defendant company; but it is not drawn by the plaintiff,

does not bear her name, nor the name of Brophy, and in itself cannot be regarded as giving to the defendant any notice of any connection between the plaintiff and the policy, or any interest of the plaintiff therein.

At least two months before the death of the insured, the plaintiff was told by two men, Mr. Herschcovitz and her nephew George Maynard, that two policies which they saw, presumably these policies, were not payable to her, the \$5,000 Manhattan policy being payable to the estate of the assured and the Metropolitan policy (which was for \$3000), being payable to Mrs. Marchant, his mother. They talked with Brophy about the matter, but did nothing else until after the death of the assured, who died of consumption. About two days after his death, Brophy came to her and persuaded her to let him take one of these policies, saying that he would get the money for her. "He did not say he would get it for Mrs. Marchant." At first she said this was the Manhattan policy, but afterwards she changed her testimony and said it was the Metropolitan policy. Instead of getting the money for her on this policy, Brophy assisted Mrs. Marchant in collecting the money on it from the Metropolitan Life Insurance Company, for which he was agent; Brophy got \$500 for himself and then ran away out of the state and has not returned since, so far as shown. Several weeks after she let Brophy take this policy, George Marchant, brother of A. J. Marchant and administrator of his estate, though she does not admit that she knew it at the time, came to her and told her that Brophy had run away. He asked her then, according to her story, to let him take the Manhattan Life Policy for a few hours to compare it with a policy that he had and she gave it to him, though she admitted that she knew at the time that it was payable to the executor or administrator of the deceased. When the administrator did not bring the policy back, she consulted attorneys and then went with her friend, Mr. Herschcovitz, and her nephew, George Maynard, to the office of Isaac L. Goff, where they met Mr. Dunham, New

England manager for the defendant company. There she told Mr. Dunham that the policies belonged to her and said nothing else. The others told him that she had thought she was beneficiary in the policy and had paid the premiums on it. They had other interviews with Mr. Dunham, but seem to have given him no further information. He said that he would see the Marchants and try to fix things up between them.

Mr. Carroll, her attorney, also testified that he told Mr. Dunham that in his opinion the whole business was a fraud on the plaintiff and that he was thinking of filing a bill in equity to restrain the company from paying the money until the matter could be investigated, and that Mr. Dunham said he would not pay the check until everything was understood. Mr. Dunham denied any such promise, but said that he agreed to see the Marchants and try to arrange the matter with them, but did not succeed. In rebuttal Mr. Carroll said that he told Mr. Dunham that the plaintiff had been beaten out of the money and that they were going to try to make them (evidently meaning the Marchants) put it back again, if they could get it, and that Mr. Dunham said he would see the Marchants and try to settle it up, if Mr. Carroll would only keep quiet and wait.

In all the interviews only the one policy seems to have been mentioned and there was no rescission or attempt at rescission of that and no demand for a return of the premiums from the company. Moreover, nothing seems to have been said about any false representations by Brophy, who apparently was not mentioned at all. All that seems to have been asked of Mr. Dunham was that he hold back payment of the amount of the policy from the administrator of the estate of the assured and try to get him to let the plaintiff have part of the money because she had paid the premiums. The plaintiff and her attorney seem to have been quite willing that Mr. Dunham should pay the company's money to the administrator, if a part of it was paid by the latter to her.

Under these circumstances, Mr. Dunham, being unable

to arrange a satisfactory settlement with the Marchants, paid over the check for the policy to the administrator. It was immediately cashed by the administrator and the paid check, with the policy attached, went back to the company. Later the present suit was brought, evidently for a return of the premiums paid on this policy alone, as the damages laid were only One Thousand Dollars (\$1,000); and it appears to have been only as an afterthought that premiums alleged to have been paid to the defendant on a later policy were asked for also.

This later policy was for \$3,500 dated October 28, 1902, and also payable to the executors, administrators or assigns of Arthur J. Marchant, but there was no satisfactory evidence that the plaintiff ever paid any premiums upon it to Brophy or ever had possession of it; and if she did, there was nothing to show how or when she got it. She testified that she paid the premiums on it for five years to Brophy, but it appeared later that this testimony was entirely unreliable. She said Brophy told her it was payable to her, but when he told her this does not appear, nor did she say that she was induced to take it and pay any premiums on it by any such statement on his part or that he had anything to do with her having the policy, if she ever had it.

At any rate, whoever had the policy at first, only two premiums were ever paid on it to the company and it lapsed in consequence and was surrendered to the company. By whom the two premiums were actually paid to the company was not shown, but they were received as the money of the assured and applied to his credit by the company, who knew nothing about the plaintiff or about anyone having or claiming any interest in either of the policies until after the death of the assured.

These two policies were produced by the defendant at the request of the plaintiff's counsel, who had described them in the bill of particulars and then for the first time claimed that the plaintiff had paid the premiums on both of them. They were issued by the defendant under the

following circumstances: Isaac L. Goff was sub-agent of Mr. Dunham for Rhode Island, with authority only to procure applications for insurance, send them through Dunham to the defendant company, and if policies were issued on them, to deliver the policies to the applicants and collect the first premiums, and his appointment as such was recognized by the company.

About the time these policies were issued, but whether before or after the first meeting of the plaintiff and Brophy does not appear, the latter, who was, as already stated, a resident agent for the Metropolitan Life Insurance Company and had no license from the State of Rhode Island to solicit insurance in any other company and had no connection whatever with Isaac L. Goff or the Isaac L. Goff Company, came to William D. Goff, who had charge of the life, accident and liability insurance department of that company and asked if Mr. Goff would allow him a commission for any business he might send him. Mr. Goff said he would and a short time afterwards Brophy brought in some business. He had the applications made out for policies on the life of A. J. Marchant and the party was examined and the policies were delivered and paid for. Brophy was not agent or solicitor for the defendant company and had no connection with the Goffs, except that during a period of about four years, he brought in some applications, not very many, on which he was entitled to commissions under the arrangement just mentioned. When the policies for which Brophy had brought in the applications came back from the company, they would be given to him and he would pay for them. Neither the home office of the company nor Mr. Dunham knew anything about Brophy or ever heard of him until after the death of A. J. Marchant. It does not appear that Isaac L. Goff had any authority to appoint sub-agents or solicitors to act for the defendant, and in fact no such sub-agents or solicitors were appointed. It is important in this connection to notice also that the plaintiff never stated

that Brophy claimed to represent the defendant dealt with him as its agent.

During the lives of these policies, when the policy was about to fall due, a notice of that fact was sent to the home office by mail, postage prepaid, to the assured at his residence and also a similar notice to the Boston office. None of these notices from the home office returned undelivered. From the above it appears not only that the assured applied for these policies, but also that he must have examined for them, but also that the policies must have been issued and that the premium was paid on them, whether or not he actually paid himself or paid any premium upon them.

Inasmuch as our disposition of this case involves certain fundamental questions, rather than a consideration of the specific exceptions, it will be more convenient to state the exceptions in detail; and we will state the general question of which we have come to our conclusion: and we state the same as follows, set forth in the defendant's brief:

1. Was there satisfactory proof that the first policy and two on the second were purchased with money of the plaintiff, especially the first policy?

II. Granting that there was such proof, does the plaintiff have the right to rescind the second policy for nonpayment of the third premium and the first two premiums?

III. Was the defendant company bound by the representation by Brophy on which the plaintiff relied?

IV. Were the policies valid and binding between the company and the assured, or were they voidable at the option of the assured, or were they never legally under a risk by reason of their being issued in consideration for the premiums received by the company?

V. If the plaintiff had any right to exercise that right promptly enough and in time, or was she guilty of laches which should bar her?

The decision of the court below, finding for the plaintiff, in the full amount claimed by her, is based primarily upon the determination, that Brophy, under all the facts above set forth, was so far the agent of the defendant, that it was bound by his fraudulent representations to the plaintiff that the policies delivered to her, while written upon the life of A. J. Marchant, were written for her benefit and named her as beneficiary; that the policies were voidable or enforceable by the plaintiff at her option, since the defendant company could not have avoided the policies on the ground of its own fraud; so that the plaintiff could choose whether she would enforce the policies, or rescind them; that she, by her notice to Dunham, the general agent or manager of the defendant, prior to the payment of the \$5,000 policy to the administrator, elected to rescind the contracts and to demand repayment of the premiums, and thereby became entitled to sue for and recover the same in this suit; and that she was not guilty of such laches in the rescission, as to bar her right of recovery.

We are constrained to differ with the court below with regard to all of the above findings, and we are of the opinion that the same are fundamentally erroneous.

With regard to the first question above set forth, the defendant earnestly contends that there was no satisfactory proof that more than one payment made by the plaintiff to Brophy on the first policy was received by the defendant and as to the second policy there was no proof that she ever paid any premiums on it to anybody. Inasmuch as we deem it to be immaterial, in the view we take herein regarding the relations and obligations of the parties, whether the plaintiff actually paid any or all of the premiums on these policies, we will not waste time or space in considering this question, further than to say that the testimony is most unsatisfactory in that it fails to trace clearly into the hands of the defendant, through Brophy, any of the moneys of the plaintiff claimed to have been paid as premiums on these policies, except the proceeds of a certain check dated October 18,

1906, drawn to the order of the defendant, on the Industrial Trust Company, Pawtucket Branch, by Lucien Heroux, for the sum of \$201.90, the proceeds of which are admitted to have been received by the defendant. As the amount of this check exactly corresponds with the last premium paid on the \$5,000 policy, it would seem from the evidence that this was a check procured from a friend by the plaintiff to pay the last premium due prior to the death of the insured. Our only purpose in calling attention to this check is to show, that even as to this payment, there is nothing to give notice to the defendant that it was made by or on behalf of the plaintiff, or that the plaintiff or Brophy had anything to do with it or had any interest in the policy upon which the payment was made. It does not appear that as to this or any other payment the plaintiff ever received any official receipts of the company, or that any payment of premiums was ever made in any such way as to notify the defendant of any interest claimed by the plaintiff in either of the policies, or that Brophy was acting or attempting to act as the defendant's agent. But, for reasons which will appear hereafter, we deem it to be immaterial whether any or all of these premiums were paid by the plaintiff, so long as the defendant was not thereby affected with notice of any claim of the plaintiff to an interest in the policies, or with notice of Brophy's connection therewith so as to make Brophy the defendant's agent.

- (1) We deem it to be clear both upon principle and authority that a life insurance policy is not void because the premiums have been paid by some one not the assured or beneficiary or by one having no insurable interest in the life of the assured, whether or not he paid them in the belief that he was named as beneficiary or that he could collect upon it. The policy is, notwithstanding, binding upon the insurance company, which must pay it according to its terms on the death of the assured. *Knights and Ladies of Honor v. Burke*, 15 S. W. (Tex.) 45; *Brennan, Admr. v. Prudential Ins. Co.*, 148 Pa. St. 199; *Prudential Ins. Co. v. Cummins, Admr.*, 44 S. W. R. 431, 25 Cyc. 751.

In *Knights & Ladies of Honor v. Burke, supra*, the court says: "One Pinson was a member of the order of the Knights & Ladies of Honor and held two benefit certificates thereon, aggregating \$3,000. Appellee, Burke, was the beneficiary in said certificate. Burke has no insurable interest in the life of Pinson. B. paid dues and assessments for P. to the amount of \$189.20. Appellant had no notice that B. and not P. paid said dues and assessments. B. ceased to pay dues and assessments for P. and while P. still lived, brought this suit to recover of appellant the said sum of \$189.20 paid out as aforesaid. He recovered judgment for said amount in both the justice's and county court. We are of the opinion that the judgment is wrong. Appellee could not be beneficiary in the certificates and could not legally claim or recover the insurance upon the death of B. Having no insurable interest in the life of P., public policy would not permit him to be recognized as a beneficiary in said certificates. . . . His payment of the dues and assessments for P. was an arrangement between P. and himself with which appellant had nothing to do. There was no privity of contract between him and appellant. Appellant was entitled to the amount paid from P. and not from B., but if B. saw proper to pay the same for P., he must look to P. and not to appellant for reimbursement. The certificates are not void, except as to B., but upon P's death, would be payable to his heirs."

In *Brennan, Admr. v. Prudential Ins. Co., supra*, such a defense was held not available to the company, when sued by the administrator of the assured upon a policy made payable to his personal representative, although the policy had been delivered to one having no insurable interest who paid all the premiums upon it.

In *Prudential Ins. Co. v. Cummins, supra*, the decision is the same, and the court says: "It appears that Mary Malley paid the premiums upon the policy in the belief that Cummins' life was insured for her benefit and that at his death the sum which the policy obligated the company

to pay would be paid to her. She did not sign the application for the insurance. . . . Had the policy been payable to Mary Malley, the question would arise as to whether she had an insurable interest in the life of Cummins; but as the policy was made payable to Cummins' personal representative, it must be treated as a contract with Cummins. The mere fact that she paid the premiums on the policy did not render invalid the contract of insurance."

- (2) As we shall show hereafter that Brophy was not the agent of the defendant, but was the agent of the assured and also the agent of the plaintiff in making such payments as were made, if any, to the defendant, it follows that the later policy for \$3,500 being a valid obligation of the company so long as the premiums were paid, and having been allowed to lapse long before the plaintiff made known to the defendant any claim of right thereunder, by reason of the failure of Brophy to pay the premiums thereon, the plaintiff had no right of rescission as to that policy, and therefore no claims to recover any premiums by her paid thereon.
- (3) As to the third question suggested by the defendant, whether it was bound by Brophy's false representations to the plaintiff, we are quite satisfied upon all the evidence that the defendant company was not bound by Brophy's false representations as Brophy was a mere broker, except so far as he was agent for the plaintiff or the assured, and had no authority from the company, express or implied, to make such representations.

That Brophy was a mere broker and not the agent of the defendant company except possibly for the sole purpose of receiving payment of the first premium is clear from the following authorities: *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141; *Reed v. Equitable &c. Ins. Co.*, 17 R. I. 785; *O'Rourke v. John Hancock, &c. Ins. Co.*, 23 R. I. 457; *Kings Co. Fire Ins. Co. v. Swigert*, 11 Bradw. (Ill.) 590 at 599; *Am. Fire Ins. Co. v. Brooks*, 83 Md. 22; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220; *Bradley v. German Am. Ins. Co.*, 90

Mo. App. 369; *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609; *How v. Union &c. Life Ins. Co.*, 80 N. Y. 32; *Devens v. Mechanics &c. Ins. Co.*, 83 N. Y. 168 at 171; *Pottsville &c. Ins. Co. v. Minnequa &c. Co.*, 100 Pa. St. 137; I Cooley's Briefs on Insurance, 68; 1 May on Insurance (4th ed.) § 124.

While the Rhode Island cases cited above do not in their facts so nearly correspond to the case at bar as to necessitate a review of the same, they clearly show that this court has always strictly construed the powers of a solicitor of insurance, or insurance broker, and has clearly defined the distinction between such a solicitor, or broker, as the agent of the assured, and a duly authorized and recognized agent of the insurance company; and that this court is fully in accord with the principles laid down in the other cases above cited.

In *Kings Co. Fire Ins. Co. v. Swigert*, *supra*, it is held that one who solicits insurance of the assured and afterwards procures a policy to be issued by the insurer is not an agent of the latter nor does the fact that the insurer placed its policy in the hands of the broker for delivery make him an agent or give rise to a presumption of agency except where there have been no previous dealings between the broker and the assured. If, in fact, before the policy is issued the assured has had dealings with the broker as by giving him an application to place, or the latter is in any way clothed by the assured with the credentials of agency, the insurer may treat him as the agent of the assured.

In *Am. Fire Ins. Co. v. Brooks*, *supra*, it is held that a broker who is employed to obtain a policy of insurance is the agent of the assured and not of the insurer, although he asks the assured to take out the policy, but his agency is not continuing and ceases upon the delivery of the policy.

In *Gude v. Exchange Fire Ins. Co.*, *supra*, suit was brought on a fire insurance policy and defended by the company on the ground that a mortgage on the insured property was not disclosed when the policy was taken out. It was pro-

cured through one Case who knew of the mortgage, but the court held that he was a mere insurance broker and that his knowledge was not the knowledge of the company. He came to the plaintiffs and solicited the insurance, saying that he represented several companies, including the defendant. His name did not appear on the policy and there was no showing that the defendant company ever knew of his existence. He had procured the insurance through its regular agents. The court says: "Giving to the evidence the construction most favorable to the plaintiffs, and assuming that he personally presented to the defendant an application for this insurance and received the policy directly from and paid the premium directly to the defendant, it does not appear that he had any relations whatever with the defendant other than an insurance broker, who, in his own behalf, solicits insurance, submits applications to the company, and, if accepted, receives the policy for the insured, and on its delivery collects the premium and pays it over to the company. Such a broker might be deemed the agent of the company for the purposes of delivering the policy and collecting the premiums, but nothing more. . . . We think the circumstances were wholly wanting from which the jury might have been warranted in finding the fact of agency."

In *Mellen v. Hamilton Fire Ins. Co.*, *supra*, it is held that the knowledge of a broker who effected the two insurances under no employment by the insurers but for a commission paid by them upon the premiums received for such risks as he procured to be effected and as they chose to accept, that subsequent insurance was being procured upon the same property does not charge the prior insurers with notice of such subsequent insurance. He is not the agent of that company for that purpose. The court said (p. 616): "The allegation that Kane was the general agent of the defendants, to whom a notice, binding on the company, of a subsequent insurance, could properly be given, is not only not sustained, but in our opinion, is plainly contradicted by the

evidence. He was an insurance broker; and from the nature of his business, as such, was no more the general agent of the defendants than of any other company or individual to whom his professional services had been rendered. In procuring the insurance he was the agent of the assured, and if, before the transaction was complete, he became for any purpose the agent of the defendants, that agency wholly ceased when he had delivered the policy to the assured and had paid over to the company the premium which he had received."

In *How v. Union Mutual Life Ins. Co.*, *supra*, an action was brought on a policy of life insurance on the life of one Marcus obtained of the defendant through James A. Rhodes. The defense was that the policy had lapsed for non-payment of two premium notes at maturity. The plaintiff claimed that Marcus had given Rhodes his negotiable note for \$640, with collaterals, out of which Rhodes was to provide for the payment of the premium notes. It is held that the note for \$640 did not operate as a payment of the premium note, and the court says (p. 38): "Rhodes was in no sense the agent of the defendant to take that note. He was the agent in the city of New York in 1872 of several life insurance companies, but not of the defendant. Judd & Blauvelt were its general agents in that city. Rhodes was largely engaged in life insurance, and when he had a larger amount of proposed insurance upon any life than he could place in the companies of which he was the agent, he would seek other companies for the surplus; and one of the companies to which he resorted occasionally for such purpose was the defendant, and in that way he procured from this defendant as many as fifteen policies. He had no transactions or correspondence of any kind directly with the defendant at its general office in Boston, but his transactions were with Judd & Blauvelt. When he desired a policy from the defendant he would apply to Judd & Blauvelt and take the application to them and procure from them a policy and receipts for the premium and deliver the policy to the

assured and receive the premium and account with Judd & Blauvelt for it, deducting such commissions, as they allowed him;" . . . "As to the defendant, his relation was substantially that of an insurance broker. He was not in any proper sense its agent."

In the above citation from Cooley's Briefs on Insurance, the law is clearly laid down, as follows, p. 68:

"An insurance broker is ordinarily one who is engaged in the business of procuring insurance for such persons as apply to him for that service. He is, therefore, usually the agent of the insured, and will be so considered, though a statute may declare that whoever in any manner aids or assists in making a contract of insurance on behalf of any insurance corporation or property owner shall be held to be an agent of the corporation for all intents and purposes.

"Though under special circumstances a broker may be the agent of the insurer . . . the mere fact that he receives a commission from the insurer for placing the insurance with him does not change his character as agent of the assured.

"A stipulation in the policy that any broker employed in effecting the insurance should be considered as the agent of the insured is no more than a declaration of the common rule."

These cases show and it is well understood by the public generally and recognized by our insurance legislation in this state, that there are insurance brokers who are paid for their work by a share in the commissions of insurance agents with whom they place business, and that this does not make them the agents of the insurers. The applications secured by them are of value to an agent, if accepted by his company, and are paid for accordingly, like so much merchandise. That there is a general arrangement as to what rate of compensation, by way of a share of the agent's commission, shall be paid cannot change an insurance broker into an agent for any particular company. No company can control his movements or be held responsible for his conduct.

(4) In the present case Brophy was not in the employment of the defendant, which had no control over him. He was not its agent in any sense, except possibly for the purpose of delivering policies entrusted to him by its agents to the persons who had applied for them and collecting the first premiums. He was not known to the company or its general agents at all, and there was nothing to show that Isaac L. Goff or anyone in his office had any right to employ sub-agents for the company.

Brophy was a regular agent for the Metropolitan Life Insurance Company, and in turning over surplus business to the soliciting agents of the defendant company, he was acting purely in the capacity of a broker. He was not held out as its agent, and there is nothing to indicate that the plaintiff regarded him as such. He certainly had no actual authority to misread one of its policies to anybody, and no such authority can be implied. The plaintiff never applied for a policy in the defendant company, no policy was ever issued to her, and Brophy had no authority from the defendant or its agents to deliver any policy to her, to make any statement as to its contents to her or to collect any premium from her. There was no privity between the plaintiff and the defendant, and if Brophy misread the policy to her and misrepresented the law to her as to insurable interest, it was not within the scope of any employment of him by the defendant company, and that company was not responsible for his fraudulent conduct. He was clearly under the above authorities, acting either as the agent of the assured, or in fraud of the assured, in delivering the policies to the plaintiff, and as the agent of the plaintiff in collecting and transmitting any of her moneys.

We are clearly of the opinion that the conclusion reached by the Superior Court to the effect that Brophy was the defendant's agent, and that the defendant was responsible for Brophy's fraudulent misrepresentations to the plaintiff, whereby the plaintiff was induced to pay the premiums, or any of them, upon these policies of insurance, was entirely

unwarranted by the evidence, and that therefore the decision, which rests entirely upon that conclusion, must be set aside.

- (5) We are of the opinion that it necessarily follows from the foregoing that the policies, issued as they were upon the life of the assured upon his own application, payable to his personal representatives after his death, were valid contracts of insurance, at the outset, and remained such, as to the earlier policy for \$5,000, until the death of the assured and payment to his administrator; and as to the second policy for \$3,500, until the same was allowed to lapse for nonpayment of premiums. We find nothing to show that, so far as this defendant was concerned, anything was done whereby its obligation to pay the \$5,000 policy ceased, or whereby it would have been justified in either refusing or delaying payment thereof, upon its presentation by the administrator with duly authenticated proofs of loss in accordance with its rules. Whatever was done with regard to any agreement with the plaintiff, as to her holding the policies and being entitled to any interest thereunder, was done between the assured, Brophy and herself entirely without any knowledge on the part of the defendant, or any fact or circumstance brought to its knowledge of which it was bound to take notice. The mere fact that the plaintiff notified the defendant's general manager, Mr. Dunham, after the death of the assured and just prior to the payment of the insurance that she had paid the premiums and had held the policies and claimed that she was entitled to some of the money or all of it, was nothing more than notice to him that she had some claim against the estate of the deceased for reimbursement of moneys paid out by her; or some claim to the proceeds of the policy which was totally at variance with the terms of the policy. He, having, as he agreed, endeavored to induce the Marchants to settle with her to her satisfaction, for such claims as she made, and having failed to do so, was fully justified in paying over the money, in accordance with the terms of the policy, to the

lawful claimant thereof (the administrator), and in leaving her to make such demand and claim upon the estate of the deceased as her counsel might advise. Neither Mr. Dunham, as agent for the defendant, nor the defendant, were bound to enter into and investigate or take notice of any of her claims as to the fraudulent conduct of Brophy, who was her own agent and who was primarily responsible to her if he had defrauded her.

(6) Furthermore, if the plaintiff had, at any time, any such right or interest in the insurance as would have enabled her to surrender the policy when she had possession thereof, she had actual notice from Brophy himself at least a year before the death of the assured, that the policy did not name her as beneficiary; and further notice more than two months before the death of the deceased, from two friends who read the policy, to the same effect. She should have acted immediately upon such information, and have laid the matters frankly before the company, if she desired any action to be taken by the defendant. By waiting until after the death of the assured, and the absconding of Brophy, she deprived the defendant of the opportunity to investigate her claim through the only two persons (except herself) who had any knowledge of the transactions. So that, even if she had, at any time, any such right to the possession of the policy or any such interest therein, as would have enabled her to surrender or rescind the same (which it does not appear that she had from any evidence before the court) having allowed the policy to get into the hands of the administrator, who was by the terms thereof lawfully entitled to the same and to the proceeds thereof, it was then too late for her to rescind or to maintain any claim against the defendant for the moneys paid out by her as premiums.

(7) Rescission for fraud or mistake is a purely equitable right and it is well settled that it must be exercised with great promptness after discovery of the truth and that it can only be exercised when the other party can be placed

in *statu quo*. If, while one delays after having knowledge of the facts, the position of the other party has altered as by the death of some person concerned in the matter or by loss of evidence, the right to rescind is lost. *Plympton v. Dunn*, 148 Mass. 523; *American Ins. Co v. Neiberger*, 74 Mo. 167; *Zallee v. Conn. Mut. Life Ins. Co.*, 12 Mo. App. 111; *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255; *Roddey v. Talbot*, 115 N. C. 287; *Fennell v. Zimmerman*, 96 Va. 197, and Mechem on Agency, edition of 1889, sec. 744.

We have carefully considered the elaborate briefs and arguments, as also the vast number of cases cited by the counsel for plaintiff, in support of their contention that the decision of the Superior Court should be sustained. We find no case cited which in any way leads us to doubt our conclusions above expressed. Most of the cases cited, which touch upon the question of fraud on the part of an agent which is to be imputed to the principal, are cases where the person actually guilty of fraud was beyond question an agent duly appointed and recognized as such by the principal. No case is cited, where the facts are at all similar to those in the case at bar, where a person acting in the capacity of an insurance broker, as Brophy was in this case, has been held to be other than an agent for the assured, or whose fraud has been imputed to the insurer.

Upon the whole case, we are of the opinion that the decision of the Superior Court must be reversed.

The plaintiff may show cause, if she see fit, why judgment should not be ordered to be entered for the defendant, on Monday, June 5, 1911, at ten o'clock in the forenoon.

Hugh J. Carroll, Waterman, Curran & Hunt, for plaintiff.

Gardner, Pirce & Thornley for defendant. *William W. Moss*, of counsel.

JUNE 30, 1911.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Master and Servant. Teamer and Hirer.*

Under the ordinary contract between a hirer and a teaming company, the servant sent to fulfill the teamer's contract remains the servant of the teamer in all matters pertaining to the performance of the contract, a necessary part of which is not only to carry the goods, but also to unload and deliver them. As to these matters the driver continues to be the teamer's servant unless by a special arrangement he is in some or all of these matters placed directly under the control of the hirer, or by the hirer's interference he makes the driver his servant as to the particular matter with reference to which he interferes.

(2) *Same.*

X. a corporation engaged in the lumber business had a verbal contract with defendant which carried on a general teaming business, to furnish to it on request, teams with drivers at a certain price per hour. Defendant furnished a team and driver, and X. directed the driver to make delivery of a load of lumber at a certain place. The driver piled the lumber in the highway upon the edge of the sidewalk, beside the gutter in front of the lot. Within a short time after he had left it the pile fell, injuring plaintiff.

Held, that in the absence of any special direction as to the unloading by X., whether the driver was the servant of X. must depend upon the terms of the contract between X. and defendant.

Held, further, that the evidence showing the contract to be the ordinary one between a teamer and a hirer, the defendant was liable for the negligence of the driver in unloading and piling the lumber.

(3) *Evidence.*

The foreman of X., a witness for plaintiff testified that he had no control over the driver except to tell him where to go. In cross examination he testified that he had all control over the driver except the power to discharge him.

Held, that, while the determination of the question whether the driver was the servant of X. or of the defendant depended upon the terms of the contract between the defendant and X., and not upon the extent of the control which the foreman of X. had assumed to exercise over the driver, yet as his testimony in cross examination was contrary to his direct testimony, plaintiff should have been permitted to obtain an explanation of his answer, particularly with reference to its bearing on the matter of unloading the lumber.

(4) *Obstruction in Highway. Delivery. Nuisance. Negligence.*

Irrespective of the liability of a person who carelessly piles lumber in a highway for the results of his negligence which may occur after he has made a

delivery of the lumber to a third person, until the lumber is delivered the duty is imposed to maintain the pile in a safe condition.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and sustained.

SWEETLAND, J. This is an action of the case for negligence brought by Clifton W. Higham, *p. a.* against T. W. Waterman Company, to recover for personal injuries sustained on the 17th day of June, A. D. 1909, in consequence of lumber piled upon a public highway, falling upon him.

Burrows and Kenyon, incorporated, is a corporation engaged in the lumber business in the city of Providence. Said corporation does not have teams of its own with which to deliver lumber to its customers. It hires from various persons horses and lumber wagons, and drivers to drive the teams and attend to the delivery of lumber sold by it to its customers. Among others it has a verbal contract with the defendant, T. W. Waterman Company, which carries on a general teaming business, to furnish to it, upon request, teams with drivers at a certain price per hour. On June 17th 1909, upon request, the defendant under said contract furnished to Burrows and Kenyon, incorporated, a double team and driver. Burrows and Kenyon directed said driver to make delivery of a load of hemlock boards at a place where a new house was being erected on Alverson Avenue in said Providence. Said driver was not accompanied by any employee or agent of Burrows and Kenyon, or by any assistant. All that the testimony clearly shows in regard to the driver's conduct in carrying out the direction to deliver said boards is that he took them from his lumber reach and piled them up in the highway, upon the edge of the sidewalk, beside the gutter, in front of the lot, where said house was being erected. Within a short time after the driver had piled them up and left them, the boards or some portion of them fell over into the gutter and injured the plaintiff, a boy seven years old, who was picking up chips of wood there. According to the testimony of certain of the wit-

nesses the pile of boards was not disturbed by any person from the time it was left by said driver until it fell over upon the plaintiff.

The case was tried in the Superior Court before a jury. At the close of the plaintiff's testimony, on motion of the defendant, the justice presiding nonsuited the plaintiff on the ground that said driver, in piling the load of boards upon the sidewalk in Alverson Avenue, was the servant of Burrows and Kenyon, incorporated, and that the T. W. Waterman Company was not liable for any negligence of said driver in that regard.

The case is before this court upon the plaintiff's exceptions to the rulings of the justice presiding excluding certain testimony and granting the defendant's motion for a nonsuit.

- The plaintiff excepted to the ruling of the justice presiding excluding certain questions asked by the plaintiff of his witness George H. Wheat. Mr. Wheat testified that he is a foreman for Burrows and Kenyon. Just what is the scope of his duty, or the extent of his authority, does not appear. In one portion of his testimony he said, "I simply have charge of the teams and sent them over." It does not appear that this witness took any part in making the contract for hiring teams and drivers from the defendant or that he knew what were the terms of said contract or the exact relations existing between Burrows and Kenyon and the driver sent with the team. This witness testified, however, a number of times, that he had nothing to do with the driver of the defendant's team and no control over him, except to tell him where to go. Afterwards in cross-examination the witness testified as follows: "Q. 48. Didn't
- (2) you have authority to point out the route which any of the T. W. Waterman teams hired by the day must take when working for you? A. I simply gave him a ticket and sent him to the job. They take, or can take, any route they want to to get there. Q. 49. And if you found them going the longest way you would have no right to object?

A. I certainly would object. Q. 50. Consider, then, that you had some control over I have a little. Q. 51. You had all control you except the power to discharge him? send him with that load. Q. 52. Didn't you control over him except the power to discharge T. W. Waterman's teams by the day? In redirect examination counsel for the witness the following questions: "Q. 53. Did you send out a man with a load did you have any idea how he should do, and how he should unload of that sort?" "Q. 54. Did you have any idea how the man should unload this lumber? Did you have anything more to do with him when you hired him to take out a single load?" Evidence of this kind was excluded by the justice presiding in the trial. The plaintiff excepted. No objection was made to the form of these questions and they were sustained on the ground that they were not proper in fact. If, as said, it does not appear that the testimony is of any value as to the exact nature of the contract between Burrows and Kenyon and the driver, or as to which Burrows and Kenyon had over him the control, the important considerations from which must be determined whether the driver was the servant of Burrows or of the defendant. The determination depends upon the terms of the contract between Burrows and Kenyon and the defendant and not upon the fact of the control which a foreman of Burrows has assumed to exercise over the driver. It is said in *Driscoll v. Towle*, 181 Mass. 416, that the chances are that some orders will be given which are strictly within the contract of the master and some expected from the relative position of the other party. If the latter has something to be done and sees a workingman at hand he is bound to do it, and if it is within the penumbra

servant is likely to obey. While he thus goes outside his master's undertaking and his own contract with his master, he ceases to represent him and he may make the other liable for his acts; but he does not on that account become the servant of his master's contractee for all purposes, or when he returns to the work which his master agreed to perform." So in *Quarman v. Burnett*, 6 M. & W. 499, Baron Parke said: "It is undoubtedly true that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment and the like." If, in the case at bar, some one having sufficient authority to represent Burrows and Kenyon had directed the driver in question to do something outside of the contract with the defendant, and the driver had done it, that circumstance would make the driver the servant of Burrows and Kenyon for that act, but it would not change the general nature of his relation with Burrows and Kenyon, which would still depend upon the terms of

(3) the contract between Burrows and Kenyon and the defendant. There is no testimony that Burrows and Kenyon gave any special direction as to the manner of unloading said hemlock boards in Alverson Avenue, and whether the driver was the servant of Burrows and Kenyon in that matter must depend upon the terms of the contract in accordance with which he was sent to Burrows and Kenyon. Although it does not appear that Mr. Wheat knew what was the extent of the control which he might properly exercise over the driver he was permitted to testify in cross-examination that he had all control over him except the power to discharge him. This was contrary to his previous testimony and the plaintiff should have been permitted to further

examine the witness, and, by questions proper in form, to obtain an explanation of this general answer inconsistent with his other testimony, particularly with reference to its bearing upon the important matter of unloading the hemlock boards on Alverson Avenue.

The principal exception of the plaintiff is to the ruling of the justice granting the defendant's motion for a nonsuit. It has been suggested that whatever may be determined as to the particular ground upon which the justice based his ruling, the nonsuit was proper, because the testimony shows that there was a delivery of the lumber to the customer of Burrows and Kenyon and that the legal effect of such a delivery would be to exonerate the master of the driver, whichever of these two companies it may be, from liability arising from the fall of the lumber upon the plaintiff.

There appears to have been no necessity for placing the lumber upon the highway, rather than upon the premises of the customer of the consignor; but we will not consider whether, in such circumstances, to place the lumber upon the highway created a nuisance and the person placing it there would not be relieved from liability for his negligence even if there had been a delivery of the pile in its dangerous condition to the consignee, who had continued to maintain it there in the same dangerous condition. For it is a sufficient reply to that suggestion that the testimony does not clearly show, that at the time of the accident there had been a complete delivery of the lumber to the customer of Burrows and Kenyon. It is also urged that the nonsuit was proper because the evidence presented at the trial was at variance with the allegation of duty contained in the declaration. In his declaration the plaintiff alleges that it "was the duty of the said defendant to have and maintain said pile of lumber in a reasonable safe and suitable condition."

Whatever may be said as to the liability of a person who carelessly piles lumber in the highway for the results of his
(4) negligence, which may occur after he has made a delivery of the lumber to a third person, there can be no question

that until he so delivers the lumber it is his duty to have and maintain said pile in a safe condition. We have already said that from the testimony the court was not justified in finding that there had been a delivery of the lumber.

- (1) To determine whose servant the said driver was in performing the act which it is alleged was negligently done, we must look to the contract, for it is not claimed that any special instruction was given to him by Burrows and Kenyon as to the manner in which he should unload and pile up said lumber. If the contract was the one ordinarily entered into between a hirer and a livery stable, an express or teaming company, the weight of authority and legal principle is that the servant sent to fulfill his master's contract remains his servant in all matters pertaining to the performance of that contract. It is a necessary part of a teamer's contract not only to carry the goods intrusted to him, but also to unload and deliver them. As to these matters the driver continues to be the teamer's servant unless by a special arrangement the driver is in some or all of these matters placed directly under the control of the hirer; or unless by the hirer's interference he makes the driver his servant as to the particular matter with regard to which he interferes. In *Driscoll v. Towle*, 181 Mass. 416, the court said: "In cases like the present, there is a general consensus of authority that although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him." In that case the negligent act of the driver complained of was the manner of driving his horse; but the driver equally remains the teamer's servant in respect to the manner of unloading and delivering the goods of the hirer.

The only testimony which we have in the case regarding the terms of the contract between Burrows and Kenyon and the defendant is that of Edwin O. Chase, the treasurer of

Burrows and Kenyon, who testified as follows: "Q. 6. Do you know under what terms the T. W. Waterman Company were carting lumber for you on the 17th of June, 1909? A. Yes, sir; the team was carting by the hour. Q. 7. Did you have any control of the teamer? A. Not other than to give them directions, where to deliver the goods. Q. 8. Did you have any power to discharge him, or anything of that sort? A. No, sir. Q. 9. And if he did not do the work properly, what would you do? A. I would send him back to Mr. Waterman. Q. 10. Did you have any more control of him than of any expressman that you might hire? A. No, sir. Q. 11. Did you have the same control over him that you did of your own men? A. No, sir. Q. 12. All that you had to do was to give him directions where to go? A. Yes, sir." This testimony shows that the contract was the ordinary one usually made with a teaming company and the control which Burrows and Kenyon had over this driver was the same as that which a person exercises over the driver of the carriage in which he rides, when he hires a carriage and horses with a driver from a livery stable, or which a person has over the driver of a moving van sent by a teaming company upon a contract to move household goods. There is necessarily a certain amount of information, instruction and direction which the hirer must give to the driver, as he would be obliged to give the principal if he had come himself instead of sending his servant. In such circumstances the weight of authority supports the plaintiff's claim that the driver continues the servant of the defendant who is liable for any negligence of the driver in unloading and piling the lumber.

In *Morris v. Trudo*, 74 Atl. 387, the city of Virgennes was carrying on work on its streets under the superintendence of one Lavalley. Lavalley hired of the defendant a double team with a driver. By the terms of the hiring the driver was to do with the team whatever work he was set to do by Lavalley—whether moving stones or using a scraper or drawing gravel. In the drawing of gravel, it was for Lavalley

to direct where the gravel should be taken from, where it should be unloaded, and how it should be placed. At the time of the accident, the plaintiff, by direction of Lavalley, was assisting the driver in shoveling out a load of gravel. The court said: "One to whom the servant of another is temporarily lent or hired, has for the time being the responsibilities of a master in so far, and only in so far, as he may exercise the authority of a master. . . . The testimony tends to show that in respect to the driving of the team the defendant committed nothing to the city or its superintendent. . . . The doctrine of *respondeat superior* fastens liability upon the defendant, since the negligent wrongdoing inhered in a thing in respect to which the relation of master and servant between him and the driver had never been suspended. . . . If the contract had been such that Lavalley might have put a driver of his own choosing in charge of the team, and have put the driver furnished at some other work, the defendant would be held to have relinquished the rights of a master, and to have been freed from responsibilities as such in all respects. Such a contract, however, the evidence does not show."

In *Quinn v. Electric Construction Company*, 46 Fed. 506, the court said: "Pursuant to a contract by which the defendant was to furnish the Western Electric Company with a horse, truck and driver daily to do its trucking work for a specified period at a specified price, the defendant each day selected from its men and equipment the horse, truck and driver which were to be at the disposition of the Western Electric Company, and on the day the plaintiff was injured had sent Murphy with the horse and truck, which he was driving at the time. Murphy had taken a load of goods for the Western Electric Company and was returning to its factory, when he ran over the plaintiff. Under the circumstances, although the Western Electric Company was the primary employer for whom the service which Murphy was engaged in was being rendered, the defendant was Murphy's immediate superior. It had hired him, and could discharge

or retain him, and thus had the selection and control of the means of accomplishing the object of the contract which had been made between the Western Electric Company and itself. The defendant was not the servant or agent of the Western Electric Company, but was an independent contractor; hence those employed by the defendant to do the work contracted for were its servants, and not those of the Western Electric Company."

"The rule of *respondeat superior* rests on the power which the superior has a right to exercise, and which, for the protection of third persons, he is bound to exercise, over the acts of his subordinates. It does not apply to cases where the power of control does not exist, and the power does not exist when the primary employer has no voice in the selection or retention of the subordinate."

In *Stewart v. California Improvement Co.*, 131 Cal. 125, the court after reviewing the authorities said: "The test in all these cases is, who conducts and supervises the particular work, the doing of which or the careless and negligent doing of which, causes the injury?"

See also *Quarman v. Burnett*, 6 M. & W. 499; *Waldock v. Winfield*, 2 K. B. (1901) 596; *Consolidated Plate Glass Co. v. Caston*, 29 Can. Sup. Ct. 624; *Singer v. McDermott*, 30 Misc. 738; *Murray v. Dwight*, 161 N. Y. 301; *Huff v. Ford*, 126 Mass. 24; *Jones v. Mayor*, 14 Q. B. D. 890.

The plaintiff's exceptions are sustained. Case is remitted to the Superior Court for a new trial.

Waterman, Curran & Hunt, for plaintiff.

Lewis A. Waterman, Ernest P. B. Atwood, of counsel.

Gardner, Pirce & Thornley, for defendant.

William H. Camfield, of counsel.

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ACCRETIONS.

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ACTION AGAINST TOWN OR CITY.

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ADOPTION.

1. The status of an adopted child depends upon the statute of adoption.
2. Pub. Stat. (1882) cap. 164, § 7, of adoption, provided that a child so adopted shall be deemed for the purposes of inheritance the child of the parents by adoption, except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation.

Testator bequeathed the income of a trust fund to his sister A. for life, with provision for distribution of the principal upon the death of A. to his then surviving next of kin, according to the statutes of distribution. Subsequent to decease of testator A. adopted B.:—

Held, that the property being from the collateral kindred (brother) of the mother by adoption, B. came within the disabilities of the statute, preventing her from inheriting any portion of the fund. *R. I. Hospital Trust Co. v. Humphrey*, 318.

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ATTORNEYS AT LAW.

1. After the suspension of an attorney from practice for a fixed term, he conducted himself in respect to the practice of his profession in the same manner as he did before the entry of such decree except that he did not appear before the courts and did not in his own name cause the process of the court to issue;

Respondent being adjudged in contempt is ordered to refrain from holding himself out in any manner as an attorney; from undertaking any legal service of a nature usually performed by members of the bar; from using his sign as an attorney upon his office, or stationery whereon his name appears as an attorney, and is suspended from practice for a further term. *In re Lizotte*, 386.

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CERTIFICATION OF QUESTION TO SUPREME COURT.

1. Gen. Laws, 1909, cap. 298, § 5, provides that "If in any proceeding civil or criminal, in the Superior Court or in any District Court, prior to the trial thereof on its merits any question of law shall arise which in the opinion of the court is of such doubt and importance and so affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, the court in which the cause is pending may certify such question to the Supreme Court for that purpose:—

Held, that, the statute excluded doubtful questions which were not important, as well as important questions which were not doubtful, and both classes of questions unless they so affected the merits of the controversy as to require the decision of this court, and all such elements must be first found to exist by the court before which the cause was pending.

Speculative and moot questions are not to be so certified under a *pro forma* ruling because of an agreement of counsel.

Quære; Whether the words "prior to the trial thereof on the merits" refer to the Superior Court, when there has been a previous trial in the District Court on the merits. *State v. Karagavoorian*, 477.

2. In a criminal complaint against a husband charging neglect to provide according to his means for the support of his wife, defendant filed a "special plea in bar" setting up an agreement of separation between himself and his wife by which the wife agreed to release him from all claims for her support, etc.:—

Held, that proper practice in criminal pleading required a plea of "not guilty."

Held, further, that as a matter of law the facts stated in the plea did not release defendant from criminal prosecution on the above charge, and as evidence must be offered to show the actual facts as to each of the parties, the plea in itself without more was worthless in determining the guilt or innocence of defendant and hence the question certified was of that class which the statute did not contemplate should be sent to the supreme court, since the negative answer of the court settled nothing material to the determination of the case. *State v. Karagavoorian*, 477.

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See INTOXICATING LIQUORS, 1-2.

See WILLS, 17-22.

CHARGE TO JURY.

1. Where no exception is taken to a charge and no special requests to charge are preferred, it must be considered that the charge correctly stated the law of the case. *Sheldon v. Wilbur*, 192.
2. When the court has correctly instructed the jury as to the law it is not required to repeat such instructions in the exact language requested by counsel. *Blake v. R. I. Co.*, 213.

CLAIMS AGAINST TOWNS AND CITIES.

See MUNICIPAL CORPORATIONS, 1; TOWN TREASURER, 1, 3.

COLLISION.

See STREET RAILWAYS, 4-7.

COMMON CARRIERS.

1. A rule of a street railway company requiring the payment of fare by its passengers by means of an automatic fare registering device held in the hand of the conductor, wherein the passenger inserts a nickel, is a reasonable regulation justifying the ejectment of a passenger who, having notice of such regulation, fails to observe it, no undue force being used.

The ejectment of a passenger, without undue force, is also justified under such regulation, where such passenger, having notice thereof, tenders five pennies in payment of fare, and refuses to receive in exchange therefor a nickel, and to insert said nickel into the automatic fare register, the passenger being notified when he tendered the pennies that they would be received by the conductor only for the purpose of providing the passenger with a nickel; it being closely analogous to the regulation requiring the purchase of a ticket by a passenger.

2. The question of the reasonableness or unreasonableness of a regulation made by a carrier for its protection in the collection of its lawful charges, is one to be determined by the court, and is not to be submitted to the jury.
3. *Seemle*: The refusal to take the five separate cent pieces under the above conditions is not a violation of the legal tender statute (vol. 2, U. S. Comp. Stat. 1901, § 3587), which provides that "the minor coins of the United States shall be a legal tender at their nominal value for any amount not exceeding twenty-five cents in any one payment," and the regulation as applied to such facts is not unreasonable as a violation of such statutory right.
4. The establishment by law of a maximum rate of fare does not abrogate the power of the carrier to make reasonable regulations as to the mode of payment. *Martin v. R. I. Co.*, 162.
5. In an action against a carrier for loss of goods in transit, defendant requested the court to charge "Plaintiff must prove delivery to the N. R. R. Co. (defendant) at K. of the goods alleged to have been lost. Proof of delivery to the W. R. R. Co. (original carrier) at H., is not sufficient." The court

modified it as follows: "But proof of acceptance of the shipment unobjectioned to by the N. Y., N. H. & H. R. R. Co. (connecting carrier) at W. and the defendant company at K. is sufficient evidence of delivery so that there would be a presumption that the shipment remained as it was when it left H."—

Held, that, as agent of defendant was apprised of the contents of the car at K., and had the opportunity to inspect it, the charge was unobjectionable.

6. *Held*, further, that under the circumstances a request to charge that the burden of proof was upon defendant to show that the loss did not occur while the goods were in its possession was properly granted. *Podrat v. Narr. Pier R. R. Co.*, 255.

7. Conditions in a bill of lading were as follows:—

"No carrier shall be liable for loss—after property is ready for delivery to consignee."

Property not removed by the person entitled to receive it within 24 hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner,——."

Defendant claimed that after car arrived at destination, it was checked up within a few minutes, and that as soon as this record was made, goods were ready for delivery to consignee and liability of carrier terminated:—

Held, that, until due notice had been given consignee that goods were ready for delivery, or until a reasonable time had elapsed within which consignee might receive the goods, the liability of carrier was not terminated. *Podrat v. Narr. Pier R. R. Co.*, 255.

See RAILROADS, 1-3; STREET RAILWAYS, 1-7.

CONDITIONS PRECEDENT.

See INSURANCE, LIFE, 1.

CONSTITUTIONAL LAW.

1. Gen. Laws, 1909, cap. 123, § 52, provides that "the finding of any liquors enumerated in this section upon the premises of any retail druggist or apothecary in quantities exceeding one half gallon shall be considered evidence that the same is kept for sale."

Held, that the section was not obnoxious to the provisions of Cons. U. S. Art. XIV of amendments § 1, nor to Cons. of R. I. Art. 1, § 10, for in carrying out a public purpose, while it might be limited in its application, yet within the sphere of its operation it affected all persons similarly situated.

Held, further, that the intent of the section was to prohibit the keeping of intoxicating liquor in quantities exceeding one half gallon whether it consisted of one kind only or was the aggregate of several kinds.

2. *Held*, further, that the statute being designed to prohibit the selling and keeping of intoxicating liquor in the shops and stores of druggists, the word "premises" meant the *business premises* of those persons.

3. While the court held in *State v. Beswick*, 13 R. I. 211, that a provision which made certain recited circumstances *prima facie* evidence against an accused was unconstitutional, as determining in advance what weight certain facts should have with the jury, in the present statute, the provision that certain

facts shall be considered as evidence that the same is kept for sale is no more than declaratory of the common law as it existed before the statute, such facts being admissible in evidence against an accused but the weight that should be given them, being for the jury to determine. *State v. Almy*, 415.

4. Chapter 376 of the Public Laws passed at the January session, 1909, in amendment of and addition to Chapter 283 of the Gen. Laws, 1909, of lotteries, policy-lotteries, etc., is not obnoxious to the provisions of Cons. R. I. Article I, sections 6, 10, and 14. *State v. Gaines*, 462.

See SEARCH WARRANTS, 1.

CONSTITUTIONAL QUESTION.

1. Upon a complaint certified to the court upon constitutional questions, technical objections will not be considered. *State v. Hand Brewing Co.*, 56.

CONTRACTS.

1. In an action to recover for professional services rendered to brother of defendant, evidence considered, and held not to sustain any implied promise on the part of defendant to pay therefor. *Churchill v. Hebden*, 34.
2. Where defendant took his boat away without waiting to signify approval or disapproval of the work done and materials furnished upon it by plaintiff, and it also appeared that the agent of defendant was about the boat during the time it was being repaired and had an opportunity to report upon the work before defendant sailed, the court properly charged the jury that they should consider whether or not defendant by his conduct did apparently accept the work. *Nock v. Lloyd*, 313.

3. In an action of assumpsit brought by a minor to recover back the purchase price of a liquor saloon and its contents, it appeared that after six weeks he made a formal tender of the saloon and contents and key accompanied by a written rescission of the contract:—

Held, that the sale was not within the rule contended for by defendant, that a minor could bind himself by a contract beneficial to him, inasmuch as a minor is disqualified by law from obtaining the license required for engaging in the liquor business.

Held, further, that in thus selling liquors to a minor, defendant committed an illegal and criminal act.

Held, further, that as under the provisions of Gen. Laws, cap. 123, §§ 7, 60, and 61, an unlicensed adult would be entitled to recover so much of the purchase money as represented the price of the liquors sold, so much the more would an unlicensed minor be entitled to recover under similar circumstances, and therefore the objection of defendant that the liquors returned were not equal in value to those sold, was untenable, even if defendant were otherwise entitled to be placed *in statu quo*.

4. A minor is not prevented from disaffirming a contract and upon return of what he received, suing for the purchase price, because of a misstatement of his age, inasmuch as such a misstatement would not give him the capacity to contract. *Chabot v. Paulhus*, 471.

See GUARANTY, 1; TROVER, 1.

CONTRIBUTION.

See SURETYSHIP, 1.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, 1; NEGLIGENCE, 3, 4; STEADY COUNSEL AND CLIENT.

See WITNESSES, 1.

CRIMINAL APPEAL.

1. The Superior Court has no jurisdiction to try a case by a jury, although jury trial is expressly waived by *Batley*, 475.

CRIMINAL COMPLAINT.

See MOTOR VEHICLES, 1.

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See EVIDENCE, 19-23; HUSBAND AND WIFE, 1-2.

CRIMINAL PLEADING.

See CERTIFICATION OF QUESTION TO SUPERIOR COURT.

DAMAGES.

1. In an action for negligence, evidence showed that plaintiff suffered a severe and almost fatal injury to his intestines and stomach, requiring a most important operation, and requiring the wearing of a brace to his abdominal wall, leaving him in a condition where he was unable in the future to do any heavy work. He also suffered a severe laceration of the leg. *Held*, that a verdict for \$9,082 was not excessive. *Black*.
2. Where there was no testimony to contradict it, the jury was instructed to accept the plaintiff's testimony upon *Podrat v. Narr. Pier R. R. Co.*, 255.

See DOWER, 3.

DECISION OF COURT.

See EXCEPTIONS, 4.

DEDICATION.

See HIGHWAYS, 2.

DEEDS.

See EVIDENCE, 26; TAXATION, 2.

DELIVERY.

See REPLEVIN, 2.

DIVIDENDS.

1. An extra dividend of fifty per cent. was declared by a corporation on its capital stock, and the stockholders were invited to subscribe to the capital stock of a subsidiary company, in which event one-half the dividend would be paid for such subscription and the other half would be paid in cash to the stockholder.

A trustee took the new stock and received the other half in cash. Upon the question as to whether such cash dividend should be paid over to the life tenant as income or added to the principal of the fund:—

Held, that, there being nothing to show that it was not a dividend of profits earned in the regular course of business, and during the term of the life estate, it came within the general rule that cash dividends go to the life tenant.

2. As a general rule cash dividends go to the life tenant, and stock dividends to the remainderman. *Newport Trust Co. v. Van Rensselaer*, 231.

DIVORCE.

1. A motion to dismiss a petition for divorce for want of jurisdiction is properly heard and determined at the earliest moment.

Want of jurisdiction can not be waived nor cured by general appearance.

Upon hearing of a motion to dismiss a petition for divorce for want of jurisdiction, evidence touching the charges of petitioner was properly excluded.

2. Where it appeared that the domicile and residence of a respondent in proceedings for divorce from bed and board was outside the State, and that petitioner did not attempt to gain a residence and domicile separate and apart from respondent until after she signed and made oath to the petition, the court was without jurisdiction to entertain the petition.

The acquirement of residence or domicile must precede the preferment of the petition; therefore a petition for divorce can not be presented with the expectation of thereafter acquiring the domicile or residence.

Semble; that in a proper case, one of urgent necessity, a wife might become a domiciled inhabitant of this State by residing here separate and apart from her husband for a fractional part of a day, for the purpose of becoming a petitioner for divorce from bed and board. *Walker v. Walker*, 28.

DOMICILE.

See DIVORCE, 2.

DOWER.

1. The Superior Court has jurisdiction of suits for dower under its general equity powers.
2. A demand for assignment of dower is not necessary to maintain a suit in equity by a widow for dower either under the general equity jurisdiction of the Superior Court or under Gen. Laws, 1909, cap. 329, § 15.
3. Gen. Laws, 1909, cap. 329, § 7, is in derogation of common law right, and must receive strict and literal construction, and relates solely to proceedings by writ of dower, and furnishes the exclusive remedy for detention of dower

and recovery of damages therefor, and while demand by the widow is necessary under such statute, neither allegation nor proof of demand is required in equitable suits for recovery of dower.

4. In an equitable suit for assignment of dower, an allegation that complainant's husband was seized in fee simple and possessed of the lands out of which dower is sought, is a sufficient allegation of his estate therein.
5. In an equitable suit for assignment of dower, it is an essential allegation that the husband in his life time and during the intermarriage was seized and possessed of an estate of inheritance in the lands out of which she seeks to be endowed. But this requirement is fulfilled by an allegation that he was within such time seized and possessed of the lands in fee-simple.
6. In such suit where the several original tracts as owned by the husband are described by metes and bounds and by reference to the deeds and the records thereof by which the husband acquired them, it is unnecessary for the complainant to describe subsequent subdivisions of the tracts. All that is necessary is for the widow to show that during her coverture the husband was seized of an estate of inheritance in certain lands which were conveyed by him and in which she has not relinquished her right of dower.
7. It is not necessary for such bill to show whether the husband deceased testate or intestate or whether the widow accepted any provision of a will in lieu of dower. It is a matter of defence.

Neither is it necessary to aver that the husband did not die seized of lands in which the widow is dowerable other than those described in the bill. That is also a matter of defence.

8. In an equitable suit for assignment of dower it is necessary that the owners of all the land in which the widow claims to be dowerable should be joined under the provisions of Gen. Laws, 1909, cap. 329, § 15.
9. In an equitable suit for assignment of dower the widow may join divers respondents without stating what their respective interests are in the several pieces of property, since they may well be supposed to have better sources of information than complainant.
10. In an equitable suit for assignment of dower a general allegation of ownership in the respondents and the source of their title is sufficient to apprise them of the complainant's claim in that particular and is enough to put them upon their defence.
11. A bill in equity for assignment of dower which seeks to have dower set off in any less than all the lands of which the widow is dowerable at the time of bringing the suit cannot be maintained under Gen. Laws, 1909, cap. 329, § 15.

Such a bill might be maintained under the general equity jurisdiction of the court, for separate suits could be brought to have dower assigned out of each several parcel of land.

12. A widow is not entitled to have dower set off to her out of lands conveyed to others by the husband in his lifetime, if the husband at his decease was seized and possessed of other lands out of which her dower might be assigned.
13. A bill in equity for assignment of dower brought under Gen. Laws, 1909, cap. 329, § 15, which is the exclusive remedy for the purpose of obtaining an assignment of dower in several parcels of land in one suit, must be brought

- against all persons owning the land out of which dower is sought, although it is not necessary to include those with whom settlements had been made.
14. A bill in equity under Gen. Laws, 1909, cap. 329, § 15, may be brought against any number of respondents irrespective of their community of interest in the lands out of which dower is sought.
 15. Gen. Laws, 1909, cap. 329, §§ 2 and 17 recognize the fact that peculiar conditions may exist wherein it will be equitable to set out dower in an extraordinary manner and the provisions of § 17 are broad enough to include a suit in equity under § 15. Such a bill might also be maintained under the general equity jurisdiction of the court.
 16. Where a bill in equity seeks to have dower set off out of several tracts it need not show who are the owners at the time of the filing thereof of each of the tracts described, if it shows who are the owners of all the tracts. *Sprague v. Stevens*, 361.

See EQUITY PLEADING, 3.

EASEMENTS.

1. Where there is no grant of a right of way by express terms in a deed or by reference to the plat and no claim of a right of way acquired by implication by reason of any actual existing way in use as an apparent and continuous easement and no claim of a right of way by necessity, a grantee acquires no right of way in a street delineated upon an unrecorded plat used by grantor in advertising and selling his land, merely by the exhibition to grantee of the plat prior to the sale of the land to him, on which plat there was a street delineated and shown under the name of Conimicut avenue, and on which the land purchased by grantee abutted, and therefore grantee is not entitled in equity to have the way opened and laid out as shown upon said plat. *Pyper v. Whitman*, 510.

EJECTMENT.

See FORCIBLE ENTRY AND DETAINER, 1.

EMPLOYERS LIABILITY INSURANCE.

See INSURANCE (LIABILITY), 1-3.

ENTRY.

See SURETYSHIP, 1.

EQUITABLE CONVERSION.

See WILLS, 1-8.

EQUITY.

1. Upon a bill in equity brought to enjoin further proceedings in an action at law where service of the writ is alleged to have been defective, it appearing that complainant appeared specially in such action only to contest the jurisdiction and there excepted to the denial of its motion to dismiss the writ,

- all of its rights are reserved if the action is sought to be further prosecuted and the bill will be dismissed. *Amer. Electrical Works v. Devaney*, 292.
2. Respondent entered a writ in a district court against petitioner and claimed jury trial on entry day. The case was unanswered but was certified to the superior court under C. P. A., § 273 and was by the superior court returned to the district court because it was unanswered and so not in order for a jury trial, and was defaulted in the district court. Execution was taken out and levied and bill filed by petitioner (defendant) to restrain the levy, and vacate the judgment. Preliminary injunction was granted:—On appeal *Held*, that as the bill did not allege that the judgment was obtained by fraud, or surprise, or that there was lack of service of the writ, or that there was any accident, mistake or unforeseen cause, but on the contrary showed that the whole conduct of the petitioner was mere negligence, he could not now complain of any of the proceedings taken.
- Held*, further, that the fact that the clerk of the district court certified the case to the superior court was an act for which the plaintiff in the action was not responsible, and did not work a discontinuance of the case.
- Held*, further, that the bill was fatally defective in that it contained no allegation that complainant had any defence to the original action.
3. It is a well settled principle of equity that an injunction will not issue to restrain the levy of an execution or vacate a judgment unless it appears from the bill that the complainant has a meritorious defence to the action. *Needle v. Biddle*, 342.

See DOWER, 1-16; EASEMENTS, 1; EQUITY PLEADING, 1-3; TAXATION, 2-3.

EQUITY PLEADING.

1. There cannot be answers and demurrers covering the same matters pending at the same time, and after admitting the jurisdiction of the court by filing an answer in an equity proceeding, respondent cannot subsequently demur on the ground that complainant has an adequate remedy at law.
2. Where a respondent by his answer has admitted the jurisdiction of the court in equity, and has not changed his position until after the statutory period within which an action at law might be maintained against him, he is estopped by his act from thereafter asserting the adequacy of a legal remedy for the complaint.
3. A bill in equity against an administrator with the will annexed in which the complainant seeks to remove the cloud upon the title to certain property purchased by him from testator as to which the widow did not release dower, and in which she has been awarded dower in the form of an annual life payment, is in effect a bill *quia timet*, of which equity has jurisdiction. *Roberts v. White*, 522.

ESTOPPEL.

See EQUITY PLEADING, 2; INSURANCE (LIABILITY), 1-3.

1. In an action upon book account, plaintiff offered in evidence books of account kept in regular course of business, for the purpose of proving not only the performance of the services and the charge therefor, but also for the purpose of showing to whom plaintiff had extended credit. Defendant had admitted the performance of the work, and the amount of the charge. The evidence was excluded:—

Held, that, in view of the admission, the only purpose in offering the books was to show that the charge was made against defendant, and books of account are inadmissible to show to whom credit was given when that fact is in issue.

2. Upon the issue as to whether defendant had employed or agreed to pay plaintiff for his services, rendered to the brother of defendant; evidence as to other payments made by defendant to other parties in connection with the same transaction was properly excluded. *Churchill v. Hedden*, 34.
3. Where an immaterial question which, considered by itself, would not be likely to produce any results of which the adverse party could complain, received an answer irresponsive to the question; but no objection was taken to such answer, and no request made to have it stricken out, and no objection taken to remarks of the court which were also irrelevant under the circumstances, an exception to the ruling of the court, admitting the question, will be overruled.
4. Where testimony had been offered without objection, as to certain deposits of decedent in various banks, then the inventory of the estate was admitted after objection, and thereafter further testimony covering the deposits referred to in the inventory was introduced, also without objection, the admission of the inventory was not prejudicial. *Sheldon v. Wilbur*, 192.
5. An answer to an interrogatory is properly ruled out, where it appears that deponent could not have testified to the fact of her own knowledge, and it does not otherwise appear that she was qualified to testify as to such fact.
6. Upon the issue of ownership of the *locus* in an action of trespass and ejectment, Q. "What do you know about the ownership of this lot? A. Well, I was always told, my earliest remembrance, that it was grandmother's. Q. Who told you this? A. My mother." It appeared that the grandmother deceased when witness was four years old.

Held, properly excluded as hearsay testimony.

7. "Q. Do you know whether your mother or grandmother or any member of your family, ever drove off trespassers or exercised any dominion or ownership over this land? A. My grandmother has had plats made, which I have seen, and she has also, so I have always understood, been on and ordered people off."

Held, that the question called for personal knowledge and the answer was irresponsive and also objectionable as hearsay.

8. A court sitting without a jury in allowing a qualified admission of papers or records *de bene*, is in the exercise of a reasonable discretion, and where it does not appear that any consideration was given to the evidence so ad-

mitted after objection, the exception to such admission will be overruled. *Baxter v. Patenaude*, 197.

9. After a question asked by plaintiff had been answered, defendant objected, and objection was sustained. On exception by plaintiff:—

Held, that, in the absence of a motion to strike out, or a caution to the jury to disregard it, it was fair to assume that the jury finding for plaintiff, considered this testimony with the other evidence, and that the trial court also considered it in coming to its conclusion upon all the evidence, and that plaintiff was not prejudiced by the ruling sustaining the exception. *McMahon v. R. I. Co.*, 237.

10. Where defendant had brought out the fact that an important witness for plaintiff, who had been present at former trials of the case, was absent from the trial, with the object of laying the foundation for an argument to the jury that plaintiff did not dare to call the witness, and plaintiff being permitted, after objection, to show the reason, testified that the last time witness was called, all he would say was that he did not remember, and he did not summon him for that reason, and no attempt was made to discover whether the loss of memory was real or feigned, the admission of plaintiff's explanation was not prejudicial.
11. In an action against a carrier for loss of goods in transit, where it appeared that a list of the goods was made by a clerk on a slip, and the list was posted by the bookkeeper in a book, and the slip was afterwards lost, the bookkeeper was properly permitted to testify as to the items making up the bill sent to defendant and that the items were taken from the entries made in such book. *Podrat v. Narragansett Pier R. R. Co.*, 255.
12. While a party may show by expert testimony the defects existing in the work sued for, and the cost of remedying those defects, he cannot show general repairs made by him upon the article some time after it had been delivered to him by plaintiff and the price of such repairs.
13. A bill rendered to one party to a suit by a third party does not prove itself or prove that the work therein referred to was done or necessary to be done or that the amount of material charged for was used upon that job or that the prices charged for the same were proper and reasonable.
14. In an action for work and labor, defendant who has set up in recoupment certain expenses incurred by reason of alleged defective work by plaintiff, cannot inquire of a witness who has not been shown to be an expert in plumbing or cost of repairs thereto, what it cost to have the work repaired. *Nock v. Lloyd*, 313.
15. A statement of the prosecutrix made on the street about half past three o'clock, about an hour after the assault was alleged to have occurred in the house, is admissible as a part of the *res gestae*, where it appears that she had made previous complaints to members of the household as they arrived soon after the commission of the offence and also accused defendant to his face when he arrived after being sent for, her conduct appearing perfectly consistent in her complaints and accusal.
16. Where a witness had testified that the prosecutrix had made a complaint to him as chief of police, "Q. Against whom?"—exception—A. (defendant).

Q. "And in consequence of the complaint did you issue the complaint in this case? A. I did."

Held, that defendant was not prejudiced. *State v. Badnelley*, 378.

17. Where an indictment charges an assault with a dangerous weapon, proof of the dangerous character of the wounds inflicted by means of the knife in the hands of the defendant, is sufficient without proof establishing the size or character of the knife. *State v. Papa*, 453.

18. While evidence of the flight of a defendant subsequent to the commission of an offence, is a circumstance which the jury is entitled to consider as an indication of the consciousness of guilt on his part, it is the province of the jury to determine the weight of this species of evidence, and an instruction to the jury that such fact of flight by the defendant made a *prima facie* case indicating guilt on his part, is prejudicial error. *State v. Papa*, 453.

19. Upon a complaint charging defendant with knowingly having in his possession a certain bill, slip, certificate, token and other device and article such as is used in carrying on, promoting and playing the game commonly known as policy lottery and policy, evidence showing that defendant had in his possession a slip of paper which was the record of the drawing of that day in the game of policy, which record was necessary in promoting the game, and that defendant when asked about the drawing of that day had, in response produced the slip, was sufficient to establish the allegations of the complaint.

20. In a criminal complaint charging defendant with knowingly having in his possession a "policy slip," a witness for the State was properly asked if he knew from his experience and knowledge what a certain slip of paper shown to him, was.

21. In a criminal complaint charging defendant with knowingly having in his possession a "policy slip," a witness who had testified that he had played the game for years was asked: "For what purpose are those policy slips shown by the writer to the player? A. Because lots of people play policy and like to see the drawing, even though they don't play today, they like to see the drawing. Q. And to whom are such slips delivered? A. To the writer."—

Held, admissible and relevant.

22. In a criminal complaint charging defendant with knowingly having in his possession a "policy slip," evidence of a conversation between a police officer and defendant was introduced, wherein defendant was asked where he got the policy slip, and gave his explanation of how it came into his possession, and thereafter he was asked to read the slip, and he did so:—

Held, that the evidence was admissible since the fact that he read the slip showed that defendant had knowledge of its significance and purpose.

23. In a criminal complaint charging defendant with knowingly having in his possession a "policy slip," "Q. What if anything did defendant say to you about that slip? A. He said it was a policy slip. Q. And you asked him what those numbers on the top meant and he told you it meant September 13th, drawing one? A. Yes," was admissible as showing that defendant knew the slip was a policy slip. *State v. Gaines*, 462.

24. In an action against a surety upon a bond, the saw defendant sign the blank bond, as to the signant's stipulations at the time is competent as *Horton v. Stone*, 499.
25. Certified copies of the public land records of the state are properly admissible in evidence under the rule in this state. Such rule has become a part of our law. *Town Council*, 528.
26. Where the issue was whether a highway existed in ancient deeds of ancestors of a party to the action, the deeds the grantors bounded the lots upon the competent evidence having strong probative force as to the existence of a highway. *Horgan v. Town Council of Jamestown*.
27. Photographs of places and things for the purpose of proving the facts proved to the particular case, as in *R. R. Co.*, 542.

See CONSTITUTIONAL LAW, 3; MASTER AND SERVANT, 3-4; STREET RAILWAYS, 3-4; TRIAL

EXCEPTIONS.

1. Under the provisions of the statutes relative to exceptions, the transcript of evidence and bill of exceptions must be filed in the first instance; but in case of an extension of time, the bill of exceptions need not be filed at the same time, but within ten days thereafter; and it is not a jurisdictional question in the prosecution of a bill of exceptions, that the transcript should be prior to the time fixed by the court for the filing of the bill. An order was made "Transcript of evidence, etc., to be made by stenographer to party ordering same or his attorney, and to be filed in clerk's office on or before May 12, 1911, or if not then, to be filed in clerk's office on or before May 21, 1911, after which transcript were filed. *Held*, properly filed. *Horton v. Amoral*, 10.
2. A bill of exceptions does not lie, in an action of tort, under Gen. Laws, 1909, cap. 340. *Town of East Greenwich v. Town of West Greenwich*.
3. An appeal from a decree of a probate court was tried in the Superior Court without a jury, and April 30, 1910, the court decided in favor of the appellant, and May 2, the justice of the peace, who had heard the case, filed a decision reversing the court's decision, denying the appeal. May 5, the justice of the peace filed a second decision reversing the first decision, sustaining the appeal. Appellee excepted to this decision. *Held*, that inasmuch as no transcript of evidence had been filed, and no petition to establish the truth of the transcript had been filed, the exceptions could not be considered.
4. Following *Ashaway National Bank v. Superior Court*, the court in recalling the rescript after decision, affirmed the decision of the court.
5. Among the papers in a cause heard by a justice of the peace, and appealed from, are the following:

a jury, on a probate appeal, was one signed by counsel of the respective parties, with the following stipulation: "It is agreed that the following statement is a true and proper statement of the testimony in said case."

Held, that if considered as a stipulation as to the evidence offered in the probate court, there was no authority giving the Superior Court jurisdiction to decide a cause upon such an instrument, and if considered as an agreed statement of facts under Gen. Laws, 1909, cap. 298, § 4, there was no authority for a decision of the cause in the Superior Court. *Whitford, Bartlett & Co. v. Townsend*, 392.

See, CHARGE TO JURY, 1; EVIDENCE, 3-4.

EXECUTIONS.

See EQUITY, 2.

FORECLOSURE.

See MORTGAGES, 2-3.

FORCIBLE ENTRY AND DETAINER.

1. Gen. Laws, 1909, cap. 46, § 19, provides "Every suit, whether in law or equity, brought by a town, shall be brought in the name of the town, unless otherwise directed specially by law." A town council voted that the town sergeant be authorized and directed to take any and all necessary steps to eject any persons holding possession of certain real estate.

Gen. Laws, 1909, cap. 340, of forcible entry and detainer, provides that "whenever complaint shall be made in writing and under oath of the complainant or of someone in his behalf," etc., that warrant in such action shall issue, etc.

Complaint was made in an action of forcible entry and detainer by the town sergeant, "acting for and in behalf of the town," and was signed "J. H. M., town sergeant of the town of E. G.":—

Held, that this was not a compliance with the requirements of the statute, and that the action not being brought by the proper plaintiff, the proceedings would be quashed.

Held, further, that the vote of the town council left to the uncontrolled discretion of the town sergeant to determine what steps should be taken, and was bad under that rule of law that discretionary powers granted to one person or body can not, by that person or body, be delegated to another.

Held, further, that the normal action to "eject any persons holding possession," of the real estate was the action of trespass and ejectment.

2. The "*manu forti*" essential to maintain an action of forcible entry and detainer is entirely different in its legal significance from the "*vi et armis*" of the ordinary trespass. *Town of East Greenwich v. Guenond*, 224.
3. Gen. Laws, 1909, cap. 340, § 11, of forcible entry and detainer, provides that the attendance and travel of the jurors shall be paid in the first instance by the complainant before the verdict shall be received:—

Held, that this requirement was mandatory and not directory, and, the fees of the jurors not having been paid, the court was without jurisdiction to receive the verdict. *Town of East Greenwich v. Guenond*, 224.

See EXCEPTIONS, 2.

FORFEITURE.

See LANDLORD AND TENANT, 4.

GARNISHMENT.

1. Where a garnishee in case of his default becomes liable by force of statute, and not by an adjudication of the court, the fact that he is charged by his default cannot be regarded as a judgment, and the garnishee may offer any defence he may have in an action against him to recover the amount for which he was charged. *Premium Tea Co. v. Mallovelle*, 335.

GIFTS.

See STOCKS, 2.

GUARANTY.

1. Defendant, a stranger to the plaintiff and the father of the president of its corporate debtor, wrote to plaintiff explaining the condition of the debtor, and the status of plaintiff's account, and gave his opinion that time was needed and expressed the hope that plaintiff would be liberal with debtor, adding the statement "and you will get every dollar due you. Understand that your claim will be in any event preferred." "In either case it calls for time which I feel you will agree with me you should grant them under the circumstances if you can be *assured* you are not to suffer by the delay. Trusting you will consider this carefully before taking any step that would add to their further embarrassment and with my *assurance* that your interests will be protected *by them*."

Plaintiff replied thanking defendant for the information and stated that a proposition had been written to defendant's son which he would doubtless submit to defendant, which proposition was a suggestion that the corporation note with endorsement of defendant, among others, be given plaintiff.

Plaintiff claiming that defendant by his letter guaranteed its claim brought suit to recover on such guaranty:—

Held, that the letter could not be construed as such a guaranty but even if sent and received as an offer of guaranty, it was not accepted by plaintiff who submitted a proposition thereafter to the son of defendant, which was never accepted. *Williams & Flash Co. v. Carpenter*, 349.

GUARDIAN AND WARD.

See WILLS, 17-22.

HIGHWAYS.

1. A town council even in the absence of statutory authority would have the power, without notice, and in such manner as it saw fit, to survey, bound and mark out the lines of an existing highway, and to take action to prevent encroachments and to remove obstructions upon the same.
2. Where a highway has been dedicated to the public, the public right therein is not lost by non-user or by adverse possession however long continued.
3. Where a highway has been laid out to navigable water, this right of access dedicated to the public will attach itself to any extension of the upland at the end of such highway, whether such be an accretion, arising from natural causes or is caused by human activity either rightly or wrongfully exerted, and such right of access to the sea over the new land will not depend upon whether the addition to the end of the highway grew from the upland outward or began in the water and thence was carried to shore. Any obstruction of such way by the erection of a wall separating the filled land from the old travelled way would constitute a public nuisance.
4. Accretions to a public highway terminating at navigable water attach to and form part of the highway.
5. Provision in a charter that the company shall have the use and enjoyment of any shore or wharves, convenient and sufficient for the purpose, which belong to the state, did not confer authority upon the company to fill in land, at the end of a highway laid out to navigable water, and to acquire any title or interest in such filled land or to obstruct the way of the public to the water. *Horgan v. Town Council*, 528.

See EASEMENTS, 1.

HUSBAND AND WIFE.

1. An agreement of separation between husband and wife, which has been fully complied with by the husband, and in which the wife agrees that she will release the husband from all claims for support, is not a bar to a criminal prosecution by the State against the husband charging neglect to provide according to his means for the support of his wife under Gen. Laws, 1909, cap. 347, § 39.
2. The legal obligation of the husband to support the wife according to his means or ability is an inseparable incident of the relation of husband and wife, which cannot be contracted away in such manner as to release the husband from liability to criminal prosecution at the instance of the State. *State v. Karagavoorian*, 477.

IMPLIED CONTRACTS.

See CONTRACTS, 1.

INCORPORATION, ACTS OF.

See WRITS, 3.

INDICTMENTS.

See EVIDENCE, 17.

INHERITANCE.

See ADOPTION, 1-2.

INJUNCTIONS.

See EQUITY, 1.

INSURANCE (LIFE).

1. A policy of insurance contained the clause "This policy after one year from its date if all due premiums The application was signed by the insured and cont "said policy shall not take effect until the same shall be by the said company and the first premium paid if health is in the same condition as described in the application the insured warranted that he was in good health." *Held*, that the existence of good health in the insured at the time of the policy is a condition precedent to the obligation of the company to pay the sum assured. At a trial of an action upon the policy the company's evidence that the insured was in good health at the time of the receipt of the first premium and that the policy shall appear by a preponderance of the testimony to be true, unless this condition has been clearly waived, and the company's right to raise this defence is restricted by some other provision in the policy.

Held, further, that it was not error to permit plaintiff to introduce evidence without first requiring specific testimony as to the time of their delivery, since the receipt of the premium on the policy raised the presumption of good health at the time of delivery, and this presumption might be rebutted by the defendant, the plaintiff's burden of proof being such presumption not shifting the burden to the defendant.

2. *Held*, further, that, but for the "incontestable clause" in the policy, the plaintiff would not have been entitled to introduce testimony as to the time of delivery of the policy, and plaintiff could not show that the insured was in good health at that time had been established by the testimony. But, more than a year having elapsed since the delivery of the policy and death of insured, testimony of physicians as to health of insured at delivery of policy was proper.

3. Testimony in an action upon a policy of life insurance that insured, 17 years of age, was nephew of beneficiary, that she lived in her family; that she and her husband had adopted him; that he was pursuing his studies under the instruction of her husband; that he had lived when the policy was issued, and continued to live six months thereafter:—

Held, that such testimony would entitle the jury to find that beneficiary had an insurable interest in the life of insured. *Mohr v. Prudential Ins. Co.*, 177.

4. A life insurance policy is not void because the premiums have been paid by someone not the assured or beneficiary or by one having no insurable interest in the life of the assured, whether or not he paid them in the belief that he was named as beneficiary or that he could collect upon it. The policy is notwithstanding binding upon the company which must pay it according to its terms on death of assured.
5. Where payments were made on a life insurance policy by one who was the agent of the assured and also the agent of a third party (plaintiff) who claimed to have paid the premiums under the belief that she was named as beneficiary in the policy, such policy being a valid obligation of the company so long as the premiums were paid and having been allowed to lapse before plaintiff made known to the company any claim of right thereunder, plaintiff had no right of rescission and no claim to recover any premiums paid by her.
6. An insurance broker is ordinarily one who is engaged in the business of procuring insurance for such persons as apply to him for that service. He is usually the agent of the insured and though under special circumstances he may be the agent of the insurer the mere fact that he receives a commission from the insurer for placing the insurance with him does not change his character as agent of the insured, and where the regular agent of another company entered into an agreement with the sub-agents of defendant company to turn over surplus business to them for a share of their commissions he was acting purely in the capacity of a broker.
7. The regular agent of an insurance company entered into an agreement with the sub-agents of defendant company, to turn over surplus business to them for a share of their commissions. He was not known to the defendant or to their general agents and it did not appear that the sub-agents had any authority to employ agents.

Held, that he was not the agent of defendant in any sense except possibly to deliver policies entrusted to him by the sub-agents and collecting the first premiums thereon, and defendant was not responsible for his conduct in misrepresenting the contents of a policy, or in misstating the law as to insurable interest, to a person who as a result paid premiums on a policy issued to a third person in the belief that she was the beneficiary under such policy, and that such premiums so paid could not be recovered from the company.

8. Policies issued upon the life of assured on his own application, payable to his personal representatives, are valid contracts, entitling the administrator to payment on proof of loss, and the fact that a person who had paid the premiums under the belief that she was the beneficiary notified the general manager of the company after death of assured that she had paid the premiums and had held the policies and claimed to be entitled to some or all of the money, was no more than notice of her claim against the estate for reimbursement or claim to the proceeds of the policies at variance with their terms, and the company was justified in making payment to the beneficiary named in the policy.

9. Where through the misrepresentation of an insurer premiums on an insurance policy under the belief of the insured that she was named as beneficiary to the policy were paid more than two months before death of assured to the insurer, by waiting until the death of assured and then making her claim to the company and getting into the hands of the person lawfully entitled to the proceeds, plaintiff had at any time any rights in the policy to rescind or to maintain any claim against the insurer for the premiums paid by her for premiums.
10. Rescission for fraud or mistake is a purely equitable remedy to be exercised with great promptness after discovery of the fraud or mistake. If delays after having knowledge of the facts the party seeks to rescind, the right to rescind is lost. *Monast v. ...*

INSURANCE (LIABILITY)

1. While a policy of employer's liability insurance was in force between the parties, wherein defendant agreed to indemnify plaintiff for injuries suffered by its employees, whose compensation was fixed by a schedule at any of the places mentioned in said policy, building, which plaintiff was constructing, was injured by defendant the required notice and after suit against defendant was instituted, defendant investigated the accident and considered the question whether the injured workman was an employee, and thereafter without reservation of defence. After verdict approved by the appellate court, defendant sought to set aside the judgment on the ground that the workman was not an employee of plaintiff. Held, that the judgment was not covered by the policy.

One of the counts of the declaration, set out the terms of the policy, and did not allege that the workman was an employee of plaintiff. The assumption of the defence by defendant with reference to the facts, it waived all right of objection that the claim was not covered by the policy:—

Held, that after plaintiff turned over to defendant, the complete control of the suit, defendant could not set aside the judgment on the ground that the result would have been different had taken charge of the matter itself.

2. *Held*, further that plaintiff was not restricted by the terms of the policy, to a recovery only in accordance with the schedule. For if the facts show a cause of action the count should stand. The right arises from waiver, estoppel or any other ground.
3. *Held*, further, that while with exactness the count should be amended to deny liability rather than a waiver of liability, the count was based on the broad equitable principle that a party who waives his right to object to a claim, cannot afterwards set aside the judgment on the ground that the claim was not covered by the policy.

of the facts should not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.

There is a distinction between *quasi* estoppel and estoppel by misrepresentation. The former includes the doctrine of election, the principle which precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver.

Held, further that the doctrine of *quasi* estoppel was broad enough to extend the liability of the defendant beyond the terms of the policy and to furnish indemnity for loss to a person not an employee. *Humes Cons. Co. v. Phil. Casualty Co.*, 246.

INTOXICATING LIQUORS.

1. On certiorari against license commissioners by a holder of a liquor license, unless the license held by petitioner is affected by the issuance of a subsequent license granted to another, petitioner has no cause of complaint. As a citizen or holder of a liquor license, he has no concern with other licenses or applications and cannot raise technical objections to the same. It is the province of the attorney general to represent the public. *Peloso v. Francis*, 282.

2. While petitioner was the holder of a valid and subsisting license for the sale of intoxicating liquors, the license commissioners issued another liquor license for the same premises to another person.

Held, that the rights and privileges of the petitioner were not affected by such action, since neither license operated to put licensee in possession of the premises, nor were the laws concerning rights in real estate or the relation of landlord and tenant affected by the issuance of such licenses. *Peloso v. Francis*, 282.

See CONSTITUTIONAL LAW, 1-3; CONTRACTS, 3-4.

JOINDER OF PARTIES

See DOWER, 8, 13.

JUDGMENTS.

See GARNISHMENT, 1; PLEADING AND PRACTICE, 8-10; SURETYSHIP, 1.

JUDICIAL NOTICE.

See WRITS, 3.

JURISDICTION.

See CRIMINAL APPEAL, 1; DIVORCE, 1-2; DOWER, 1; PLEADING AND PRACTICE, 7.

JURORS.

1. The affidavit of a juror as to his own misconduct in taking an unauthorized view, is inadmissible to impeach the verdict.

On the ground of public policy, affidavits of jurors as to their own misconduct in or out of the jury room during a trial are inadmissible to impeach a verdict.

So also, an affidavit to the declaration of a juror, impeaching a verdict not only contravenes the same rule but is also objectionable as hearsay evidence. *Phillips v. R. I. Co.*, 16.

See FORCIBLE ENTRY AND DETAINER, 3.

JURY TRIAL.

1. A case was tried in a district court and held for advisement and decision rendered without notice thereof to the parties whereby petitioner alleged that he was deprived of the opportunity to claim a jury trial:—

Held, that as the duty of notifying parties of its decisions is not imposed by statute upon a district court, and as the petition contained no allegation that the court agreed to so notify petitioner, the case followed the general rule that a party who fails to follow his cause is without remedy. *Bolotow v. Barnes*, 333.

2. Where a case is entered in a district court and jury trial claimed by plaintiff on entry day and such case is unanswered the provisions of C. P. A., § 271 (Gen. Laws, 1909, cap. 286, § 6) control C. P. A., § 273 (Gen. Laws, 1909, cap. 286, § 8) and the case should remain in the district court and be there defaulted, as no issue has been made needing a jury trial. *Needle v. Biddle*, 342.

See CRIMINAL APPEAL, 1; EQUITY, 2.

LACHES.

See INSURANCE (LIFE), 9-10.

LANDLORD AND TENANT.

1. Defendant a monthly tenant upon giving notice of intention to move was informed by plaintiff that the notice was insufficient, and that rent for the succeeding month would be claimed. Plaintiff also wrote defendant to same effect, and suggested necessary precautions to prevent damage to the premises. Plaintiff also at an interview with defendant insisted that he should claim an additional month's rent. After defendant moved, plaintiff ascertained that the water had frozen and defendant left a key with plaintiff for the purpose of having the plumbing repaired. No other keys were delivered, and plaintiff, after repairing the plumbing, had certain ordinary repairs made such as are commonly made while a tenant remains in possession. Some of this work was done prior to the termination of the period for which plaintiff claimed rent, but without objection from defendant, who came to the house while the work was being performed:—

Held, that there was no surrender and acceptance of the premises, and that plaintiff was entitled to recover for the month in question.

2. The relation of landlord and tenant cannot be determined except by the expiration of the lease where there is a lease for a fixed term or, in case of a tenancy from year to year or from month to month by notice given in

accordance with the statutory requirements, except by the surrender of the premises by the tenant and the acceptance of such surrender by the landlord. Whether or not there has been such acceptance or surrender is to be determined by the intention of the parties, and this intention is to be determined by their acts and words.

3. In case of abandonment of leased premises by a tenant it is the landlord's right to enter and do such work as is necessary for the protection of the property and entrance for such purpose and the performance of such work will not convert a mere abandonment by the tenant into a surrender and an acceptance thereof. *Smith v. Hunt*, 326.

4. Under a covenant in a lease, whereby lessee agreed to pay the stated rent on the eleventh day of each month and in case of failure to pay any rent within ten days subsequent to the time, that lessor might terminate the lease, lessee made tender of the rent due on the 11th of a month to the lessor on the 22nd of that month which was refused and lessor brought ejectment.

Held, that demand by the lessor was necessary before he could declare a forfeiture and that the tender on the 22nd, prior to the declaration of forfeiture, was a good tender and precluded lessor from thereafter declaring a forfeiture. *Moran v. Lavell*, 338.

LEASE.

See LANDLORD AND TENANT, 1-4; TAXATION, 2-3.

LEGAL TENDER.

See COMMON CARRIERS, 3.

LIABILITY INSURANCE.

See INSURANCE (LIABILITY).

LIFE TENANT AND REMAINDERMAN.

See DIVIDENDS, 1-2.

LIMITATIONS, STATUTE OF.

See PLEADING AND PRACTICE, 6.

MASTER AND SERVANT.

1. Plaintiff, in going to the rear of his loom, turned his ankle, and in falling, his arm was caught in the belt, conveying power to the loom and injuring him. Plaintiff claimed that he was injured through an inequality in the floor, unnoticed by him, but it appeared that he must have travelled over, or in close proximity to, this identical spot many thousand times without turning his ankle, the floor being in the same condition as it was when he went there to work and in addition, plaintiff swept that portion of the floor each night.

Held, that the accident from that cause was not one that a reasonable and prudent man could be expected to foresee the probability of, and therefore defendant was not negligent in constructing or maintaining the floor in that manner.

Held, further, that, assuming the negligence of defendant was obvious and assumed.

Held, further, that although plaintiff testified that he yet, as it would have been evident to his sense could not avail himself of this excuse. *Masterson*

2. A machinist accustomed to the workings of machinery not acquainted with windmills, sent aloft sixty feet a defect in the operation of the windmill, with a vanism in motion, realizing the necessity of first lash the means at hand for lashing it, is bound to deal with the dangers to which he was exposed and let the piston rod would work if the mill was not lashed tributary negligence in not fastening it as sufficient. *Irons v. Greene*, 383.

3. Upon the issue as to whether defendant used a defective, which defect it knew or would have known the accident being the same as that before the court in *Gas Co.*, 30 R. I., 547, and the evidence tendentially similar to those in such case, the court is upon the part of defendant, leaving the cause purely plaintiff has failed to sustain the burden of proof. *Co.*, 394.

4. Under the ordinary contract between a hirer and a servant sent to fulfill the teamer's contract remain in all matters pertaining to the performance of the contract of which is not only to carry the goods, but also to take care of them. As to these matters the driver continues to be controlled by a special arrangement he is in some or all of the matters under the control of the hirer, or by the hirer's driver his servant as to the particular matter where the driver interferes.

5. X. a corporation engaged in the lumber business defendant which carried on a general teaming business upon request, teams with drivers at a certain price and furnished a team and driver, and X. directed the driver to load a load of lumber at a certain place. The driver piled the load upon the edge of the sidewalk, beside the pile of lumber. Within a short time after he had left it the pile fell. *Held*, that in the absence of any special direction as to whether the driver was the servant of X. must depend upon the contract between X. and defendant.

Held, further, that the evidence showing the contract between a teamer and a hirer, the defendant was the driver in unloading and piling the lumber.

6. The foreman of X., a witness for plaintiff testified over the driver except to tell him where to go and the driver testified that he had all control over the driver except him.

- Held*, that, while the determination of the question whether the driver was the servant of X. or of the defendant depended upon the terms of the contract between the defendant and X., and not upon the extent of the control which the foreman of X. had assumed to exercise over the driver, yet as his testimony in cross examination was contrary to his direct testimony, plaintiff should have been permitted to obtain an explanation of his answer, particularly with reference to its bearing on the matter of unloading the lumber.
7. Irrespective of the liability of a person who carelessly piles lumber in a highway for the results of his negligence which may occur after he has made a delivery of the lumber to a third person, until the lumber is delivered the duty is imposed to maintain the pile in a safe condition. *Higham v. Waterman Co.*, 578.

MECHANIC'S LIEN.

1. Pub. Laws, cap. 696, § 4, passed March 21, 1888, provided that no person who shall do work for or furnish materials to be used in the construction, erection or reparation of any building, etc., without written contract, shall have any lien therefor unless he shall commence legal process for enforcing the same, within six months from the time of the commencing the doing of such work, or of the commencing the delivery of materials, if payment for the same shall not then be made.

Materials were delivered under an entire contract made November 14, 1894, and delivery began November 15, 1894. Legal process was commenced June 5, 1895.

Held, that this was not a compliance with the statute, which being in derogation of common law right must be construed strictly. *McParlin v. Thompson*, 291.

2. In a single notice of claim of lien, petitioner's claim was stated as being for certain materials to be used in the construction of a certain building upon "those certain lots of land with buildings, laid out and designated as lots numbered 11, 12, and 15," on a certain plat.

In the single statement of their account, filed as the commencement of legal process, the claim was stated "to the extent of one-third of account set forth in detail and annexed hereto in that certain building and the land on which it is located, described as: (a) the southerly half of that lot designated as number 11 on the X. plat; and one-third of account in that certain building and the land on which it is located described as (b) the northerly half of the same lot, and one-third of account in that certain building and the land on which it is located, described as (c) lot 15 on the same plat:—

Held, that the case was governed by *McElroy v. Keily*, 27 R. I. 64, and petition must be dismissed. *McDuff Coal Co. v. Del Monaco*, 323.

MEMORANDA.

See EVIDENCE, 11.

MINORS.

See CONTRACTS, 3-4.

MORTGAGES.

1. A mortgage requiring twenty days notice of sale by advertisement, the first publication was on February 28; and the remaining on March 6, 13, and 20, in a paper published weekly, the sale to be held on March 24.

On February 28, the mortgage was owned by A. On March 3, A. assigned the mortgage to respondent B., the other respondent C. acting as broker for B.

- B. testified that he had no knowledge of the advertising and had given no instruction to foreclose.

Held, that B. could not order a sale under a mortgage which he did not own, and even if it were not clear that C. assumed to act for B. in the matter of the sale after March 3, when B. became the owner of the mortgage, the notice was not published the required time thereafter and hence the sale was invalid. *Eisenberg v. Gallagher*, 389.

2. In 1892, X. gave a mortgage to plaintiff, and in June, 1894, it was foreclosed and the title purchased by plaintiff, and X. continued to live on the premises until his decease. December 19, 1899, X. brought a bill in equity claiming the mortgage was obtained by coercion, but upon trial it was held to be valid, final decree being entered December 3, 1902.

December 2, 1909, plaintiff brought trespass and ejectment against the heirs of X.

Held, that the relation of a mortgagor holding possession in subordination to the title of the mortgagee existed from 1892 to 1894, and from 1894 to December 19, 1899, the possession of X. was that of a mortgagor continuing in possession as a tenant at will or sufferance holding in subordination to the title of the mortgagee, unless it was shown to have been interrupted by distinct, positive and notorious acts on the part of the mortgagor or his successors which were brought to the attention of the mortgagee or were of such notorious a character as would ordinarily come to its attention, which was not established.

The presumption is that the possession of a mortgagor after a foreclosure is held in subordination to the title of the purchaser until a contrary intention is made manifest. *First National Bank v. Dispeau*, 396.

3. Property being subject to a first mortgage of \$2,500 and a second mortgage of \$1,500, defendant, the second mortgagee, foreclosed that mortgage, and at the sale bid \$2,625.00, thinking such bid included the amount due under the first mortgage, but learning that plaintiff, the mortgagor, claimed that the bid was over and above the first mortgage, he repudiated the sale and no deed was delivered to him.

Plaintiff brought an action for money had and received to recover the surplus;

Held, that, as no money was paid defendant and he did not receive the equivalent of any money, inasmuch as he never received the title of the mortgagors to the premises or any interest constituting a consideration sufficient to create a liability for the alleged surplus the action did not lie.

Held, further, that if plaintiff had sustained any injury by the act of defendant he had his remedy in an appropriate proceeding. *Welch v. Cummings*, 400.

1. Criminal complaint under Gen. Laws, 1909, cap. 86, § 11, charged defendant with operating a motor vehicle "on Broadway, a public highway in said Pawtucket, where the territory contiguous thereto is closely built up, at a rate of speed greater than fifteen miles per hour."—
Held, that the complaint contained all the information necessary to notify defendant of the nature and cause of the accusation, as he was presumed to know the law, including the definitions therein of "closely built up."
2. *Held*, further, that under Gen. Laws, 1909, cap. 86, of motor vehicles "territory" is considered with reference to its location as being either within or without the limits of a city, village or town and territory within a city, village or town as being devoted or not devoted to business. The third definition in said section including the provisos has reference to territory outside the limits of a city or village, and is inapplicable to the complaint which charges an offence committed within the limits of a city.
3. *Held*, further, that it was not necessary that the complaint should furnish information in addition to the allegation of place, therein set forth, to enable defendant to ascertain in which section of the city, either business or residential, he was charged with exceeding the statutory speed limit. This he could determine for himself by inspection, or a bill of particulars might be obtained.
4. In a criminal complaint charging a violation of the speed limit, evidence as to what police departments used the Jones Speedometer offered for the purpose of proving the accuracy of the speedometer belonging to defendant, was properly excluded.
5. In a criminal complaint charging a violation of the speed limit as the statute prohibits the operating of motor vehicles on any public highway, where the territory is closely built up, in any event, at more than fifteen miles per hour, evidence as to whether defendant was operating his machine in a reasonable and safe manner, was properly excluded. *State v. Buchanan*, 490.

MUNICIPAL CORPORATIONS.

1. Under the statutes relative to actions to recover claims against towns, the primary liability to pay a judgment obtained in an action brought under the statute "against such treasurer" is imposed upon the town treasurer, although the ultimate payment is to be made by the town, if necessary, by a special tax levied for the *reimbursement* of the treasurer. *Barber v. Barber*, 266.
2. Defendants were elected as a town council, and at a financial town meeting subsequent to their qualification it was voted "that the annual salary of each member of the town council shall be fifty dollars, which sum shall be his full compensation for all services performed by him as a member of the town council, or on any committee thereof, or for any services performed by him for the town in any capacity during the term for which he is elected."
Held, that following *Quinn v. Barber*, 31 R. I. 538, the vote constituted a limitation upon any appropriation for the payment of the salaries during the

year and the town treasurer could not exceed such limitation, and the town was entitled to recover any excess of such salary paid to the members. *Warwick v. Barber*, 445.

See TOWN COUNCIL, 1; WRITS, 1.

NEGLIGENCE.

1. In a writ and declaration the action was styled "an action of the case," and the declaration stated that it was the duty of the defendant "to exercise due proper and reasonable care in the control, management and operation" of his premises and in the blasting or quarrying of rock or stone and to give to travelers due proper and sufficient notice of such blasting so that they would not be injured.

The declaration alleged as to the wrongful act complained of; "that said (deceased) was in the exercise of due care and was driving a horse and wagon over said avenue and while driving as aforesaid and in the exercise of due care he was struck with a certain stone which was thrown by blasting from said ledge over said highway, which said blasting was done by said defendant," etc. The declaration did not state whether or not the accident was due to negligence.

Held, that the declaration sounded in trespass, and such declaration founded on a writ sounding in case was permitted under C. P. A., § 246, so that the action was in form an action of trespass and not an action on the case for negligence, and hence evidence offered in regard to the negligence of defendant in the matter of the use of explosives was strictly inadmissible, but being offered by plaintiff, he could not on exceptions to denial of a new trial by Superior Court, after verdict for defendant, object to its effect upon the jury.

Held, further, that the effect of the charge to the jury was to eliminate any consideration of the general and conflicting testimony as to defendant's negligence in preparing and operating the blast, narrowing the case down to the question of the sufficiency of the warning given by defendant and the contributory negligence of deceased.

2. Negligence need not be shown in order to recover for damage done by matter thrown from the premises of defendant by blasting, resulting in injury or death to a person traveling on a highway.
3. Contributory negligence, is a bar to recovery in cases of this character as in other cases of personal injury or death.
4. Defendant engaged in blasting upon his premises, sent an employee to warn travellers on the highway, to a point sufficiently far from the blast to be a safe place to wait until after the blasting was over.

There was ample evidence to warrant the jury in believing that full and explicit warning was given deceased and it being undisputed that he was in a safe place when the warning was given and voluntarily disregarded the warning and moved forward into a place of danger when he met his death, a verdict for defendant approved by the trial judge will not be disturbed. *Wells v. Knight*, 432.

See, DAMAGES, 1; MASTER AND SERVANT, 1-7; RAILROADS, 1-3; STREET RAILWAYS, 1-7.

NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 1, 4, 5.

NEW TRIAL.

1. In an action of negligence, defendant petitioned for a new trial on the ground of newly discovered evidence, and in support of the motion filed affidavits covering alleged conversations with a witness, in which conversations witness admitted that he committed perjury at the trial:—
Held, that the evidence would not be admitted to impeach the verdict. *Blake v. R. I. Co.*, 213.
2. The rule established in the State before the creation of the Superior Court, that to justify the grant of a new trial, on the ground that the verdict was against the evidence and the weight thereof, it should appear that the evidence *very strongly* preponderated against the verdict, was the rule governing the court of last resort and not the trial court.
A trial court properly granted a motion for a new trial where, in the judgment of the court, the evidence was *fairly preponderant* in showing that plaintiff's intestate was guilty of contributory negligence.
A trial court ought to grant new trials, whenever its judgment shows that the verdict fails to administer substantial justice, or whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy. *McMahon v. R. I. Co.*, 237.
3. As the justice presiding at a jury trial may freely and independently exercise his power to grant a new trial whenever in his judgment the verdict fails to administer substantial justice, such disapproval of a verdict by him will be maintained by the appellate court, unless it appears clearly that his conclusion was erroneous. *Barbour v. Hall*, 245.
4. Upon a petition under Gen. Laws, 1909, cap. 297, § 3, for leave to file a motion for new trial in the Superior Court on the ground of newly discovered evidence, affidavits considered and none going to the merits of the controversy; some being of an impeaching character, and others inadmissible in evidence, the petition will be dismissed. *Chapin v. Stone*, 309.
5. Under the provisions of Gen. Laws, 1909, cap. 297, § 2, newly discovered evidence cannot be alleged as a ground for a new trial.
6. An omnibus petition under the provisions of Gen. Laws, 1909, cap. 297, § 2, upon the ground that petitioner "did not have a full, fair, and impartial trial in said cause," is deficient. *Chapin v. Stone*, 311.
7. The general rule laid down in *Wilcox v. R. I. Co.*, 29 R. I. 292, that the verdict of a jury when approved by the justice who presided at the trial, will be sustained by the court, in the absence of anything to indicate that the jury were improperly influenced or that the judge erred in his ruling, can properly be applied also in criminal cases and for the same reasons.
8. In a motion for a new trial filed under Gen. Laws, 1909, cap. 298, § 12, in the Superior Court, claims that petitioner did not have a fair and impartial trial, because of the instruction of the court to the jury and because the court permitted the attorney general to make certain statements to the jury, are

inappropriate in such a motion, since "error of law occurring at the trial," is expressly excluded from the reasons for which a new trial may be granted under said section, the exclusive remedy in a case where a trial has not been full, fair, and impartial being by a petition to the Supreme Court for a new trial under Gen. Laws, 1909, cap. 297, § 2. *State v. Papa*, 453.

9. Where there is nothing in the evidence to indicate that the jury were not warranted in arriving at the conclusion which they did, a motion for a new trial is properly denied by the justice of the Superior Court, who is not permitted to pass upon his own errors of law, if any there be. *State v. Papa*, 453.

See EVIDENCE, 18.

NOTICE.

See INSURANCE (LIFE), 8; MORTGAGES, 1.

PARTIES.

See DOWER, 8, 13.

INTOXICATING LIQUORS, 1-2; PLEADING AND PRACTICE, 4.

PARTNERSHIP.

1. A. and B. were co-partners a provision of their articles of agreement as to dissolution being as follows:—"After all the affairs of the copartnership are adjusted and its debts paid off and discharged, then all the stock and stocks as well as the gains and increase thereof which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise, shall be divided equally between the parties."

A. contributed \$500 as his share of the capital and B. contributed certain apparatus. The firm was also indebted to A. for money loaned.

Upon the question of the distribution of the assets in dissolution;—

Held, that there being no indebtedness to creditors of the firm, the money loaned by A. should first be repaid and then the amount of capital contributed by A. and B., should be adjusted and paid, before any division of profits should be made.

Held, further, that the depreciation caused by the use of the apparatus contributed by B. should be borne by the firm, and having been ascertained the amount found to be due should be repaid him, each partner contributing one-half.

Held, further, that if the capital contributed by A. had also suffered a loss, that should be ascertained as well and repaid in the same manner, and thereafter a division of the profits should be made in the proportion provided by the agreement. *In re Hall*, 424.

PERJURY.

See NEW TRIAL, 1.

PERPETUITIES, RULE AGAINST.

See WILLS, 10-16.

PLATS.

PLEADING AND PRACTICE.

1. Where it is conceded that a declaration is bad for duplicity, and it appeared on argument upon demurrer that plaintiff relied upon a case at variance with the allegations of his declaration, it is unnecessary to consider further objections to the declaration, but plaintiff should move to amend in order that it may conform to the truth of the case. *Dawiski v. Natick Mills*, 1.
2. Where a defendant had failed to give notice to the plaintiff, under the provisions of rule 18 of the Superior Court, to put him upon proof of the character and capacity of the defendant, who was sued as "administrator with the will annexed," a motion for direction of a verdict, on the ground that plaintiff had not proved the appointment of the defendant as administrator, was properly denied.
Even without such rule, in the absence of a special plea, the representative capacity of defendant should be deemed to be admitted. *Roberts v. White*, 185.
3. In an action upon promissory note, declaration averred that, after decease of intestate, plaintiff "presented said note and his claim thereon to the defendant" (administrator), while the proof showed that the claim was filed in the office of the clerk of the Probate Court:—
Held, that, as the law required that the claim be filed in the Probate Court within a certain time, as a preliminary step to its allowance or to suit thereon in case of disallowance, the declaration was demurrable, although amendable, but as defendant neither demurred nor objected to the evidence offered by plaintiff, and proper presentation of the claim according to law was proved, the defendant could not, on exceptions to direction of verdict for plaintiff, object on the ground of variance. *Roberts v. White*, 185.
4. A collector of taxes cannot bring an action against himself as town treasurer to recover compensation for his services as collector. *Barber v. Barber*, 266.
5. After a demurrer had been sustained on substantial grounds, April 21, 1908, plaintiff did not except to such decision, but on June 30, 1908, moved to amend the declaration.
Held, that, the court had authority in its discretion to permit such amendment before the entry of judgment. *Atlantic Mills v. Superior Court*, 285.
6. Where an amendment to a declaration does not state a new or a different cause of action than the one originally and insufficiently declared upon, but is merely a more detailed explanation of a fact stated in the original declaration, the Superior Court has discretion to permit the amendment, although the period of the statute of limitations has elapsed. *Atlantic Mills v. Superior Court*, 285.

7. A party filing a special plea or motion does not sue the court and thereby waive his special plea, well ruled, he excepts and proceeds to a trial upon the case again in the appellate court insist upon his special plea. *Amer. Electrical Works v. Devaney*, 292.

8. In an action of debt on judgment containing a special plea had been stricken from the record, plaintiff substitute another single count:—

Held, that the action of plaintiff in withdrawing released defendant from pleading thereto and he defend himself whether the action of the court was correct.

9. The court could not properly direct a verdict for no plea filed, as there was no issue for the jury to try.

10. A plea of *nul tiel record* is to be heard by the court. *Quære*; if the Superior Court has jurisdiction to permit an action on a different judgment amounting to less than the original action brought to that court by claimant. *Ibello*, 307.

11. While a party has not the right to amend pleading has been opened to the jury, yet the court may in its discretion permit it, and where the opposing party does not object but goes to trial on the amended declaration, he has no ground for a new trial. *Sweeney v. McKendall*, 347.

See CONSTITUTIONAL QUESTION, 1; JURY TRIAL, 1-4; TRIAL, 6.

See WRITS, 1-3.

FOR JOINDER OF WRIT IN CASE WITH DECLARATION OF DEFENDANT'S NEGLIGENCE, 1.

POLICY LOTTERY.

See CONSTITUTIONAL LAW, 4; EVIDENCE, 1.

POWERS.

See FORCIBLE ENTRY AND DETAINER, 1.

See TRUSTS, 12.

POWERS OF SALE.

See WILLS, 1-8.

POWERS IN TRUST.

See WILLS, 11.

PRINCIPAL AND SURETY.

See REPLEVIN, 1-4; SURETYSHIP, 1.

PROBATE LAW.

1. While two appeals were pending from decrees of a probate court, one being for the sale of real estate, and the other for an allowance of an account of an executrix, and the first appeal having reached the Supreme Court on exceptions, the second came on for trial and appellants moved that it be taken from the jury on the ground that the appeal being tried in the body of the former appeal, the verdict might be inconsistent with the opinion of the Supreme Court in the first appeal:—

Held, properly denied. *Read v. Gardner*, 486.

See PLEADING AND PRACTICE, 3.

PROCEDURE.

See JURY TRIAL, 1.

PROCESS, SERVICE OF.

See WRITS.

QUASI-ESTOPPEL.

See INSURANCE (LIABILITY), 1-3.

RAILROADS.

1. Section 3787, General Statutes, Connecticut, provides that the driver of an engine on a railroad shall commence sounding the bell or whistle when such engine is approaching and is within eighty rods of the place where the railroad crosses any highway at grade and shall keep such bell or whistle occasionally sounding until such engine has crossed such highway.

Request to charge that "If the jury find that the whistle was blown at the whistling post for the Union street crossing and the bell on the engine kept sounding occasionally as the train approached the crossing, then the defendant performed its whole duty, there being in evidence no exceptional circumstances making it necessary for the defendant to do anything further.

Held, properly refused since it neither conformed to the language of the statute or the construction placed upon it by the Supreme Court of Connecticut in *Tessmer v. R. R. Co.*, 72 Conn. 208.

2. Request to charge "The jury cannot find the defendant negligent on the ground that the whistle was not again sounded between the whistling post for Union street crossing and the crossing itself after the regular crossing whistle had been blown."

Held, properly refused since it did not contain the further proviso that the bell was kept occasionally sounding until the engine had passed the crossing.

3. Evidence considered, and while conflicting, there being substantial testimony supporting plaintiff's contention that defendant did not perform its duty in giving the statutory signal, and conflicting evidence as to the due care of plaintiff, the verdict for plaintiff having the approval of the justice presiding at the trial, will not be disturbed. *Curtis v. R. R. Co.*, 542.

RAPE.

See EVIDENCE, 15-16.

READING EVIDENCE TO

See TRIAL, 1.

RECITALS.

See EVIDENCE, 26.

RECORD.

See SURETYSHIP, 1.

RECORDS.

See EVIDENCE, 25.

REGISTRATION OF BOTTLE

See SEARCH WARRANTS, 1.

REMAINDERS.

See TRUSTS, 11; WILLS, 19-21.

REPLEVIN.

1. A replevin bond was signed, "Frank C. Stone by two sureties. It appeared that the bond was signed in blank at the request of Wood and delivered in stipulation that it was signed for Stone and only to be sent to Stone who was away to be signed by he (defendant) never authorized its delivery to any condition. The bond was signed by Wood, as an officer:—

Held, that (1) the bond was not a valid statutory bond so decided by both the district and superior court and objection to such decision is *res adjudicata* in inspection of the bond shows that it is not in compliance with 1896, cap. 272, § 3 (now Gen. Laws, 1909, cap. 3).

2. *Held*, further, that no valid delivery of the bond was made it binding upon the surety, but the delivery was without authority upon Wood to sign Stone's name as an invalid form to the officer.

3. *Held*, further, that the bond without the signature was void, as to the sureties.

4. Where an officer is tendered a bond in replevin not in the execution thereof in the name of the principal, it is competent to put him upon inquiry whether the sureties could be held thereunder. *Horton v. Stone*, 499.

RESCISSIION.

See **CONTRACTS, 3-4; INSURANCE (LIFE), 5, 9, 10.**

REVIEW.

See **NEW TRIAL.**

RULES OF COURT.

See **PLEADING AND PRACTICE, 2.**

SALARIES.

See **MUNICIPAL CORPORATIONS, 2.**

SEARCH WARRANTS.

1. Gen. Laws, 1909, cap. 198, §§ 2-3 (of the protection of owners of cans, bottles, &c.), is not obnoxious to Cons. R. I., art. 1, § 10, or to Cons. U. S., art. XIV, § 1 of amendments.

Gen. Laws, 1909, cap. 198 (of the protection of owners of cans, bottles, &c.), provides that, upon complaint duly made, the court shall issue a search-warrant, and shall also cause to be brought before it the person in whose possession the receptacles are found, and shall enquire into the circumstances of such possession, and if it finds that such person has been guilty of violating the act, shall impose the punishment therein provided, &c.

A search-warrant, issued under said chapter, directed the officer, if any of the articles were found, to bring them, together with the body of the person in whose possession they were found, before the court to be dealt with as to law and justice should appertain:—

Held, that the search-warrant issued was a proceeding *in rem* against the goods, and the fact that it contained a command to also bring the body of the person in whose possession the goods were found did not change its character.

Held, further, that there was nothing in the statute to indicate that the person so brought before the magistrate was to be arraigned or tried upon the complaint which was the foundation for the search-warrant.

Held, further, that whether the arrest was made under the search-warrant or upon process issued contemporaneously therewith or subsequent thereto, a complaint for violation of the statute should have been made, and upon that complaint the accused could have been tried.

Held, further, that the irregularities in the case at bar were not occasioned by the statute, and did not arise from a compliance with its provisions; and (*semble*) even if such proceedings were absolutely void for unconstitutional irregularities, that would not affect the constitutionality of the statute unless such irregularities were made essential requisites by its terms. *State v. Hand Brewing Co.*, 56.

SERVICE OF WRITS.

See WRITS.

STATEMENT OF FACT

See EXCEPTIONS, 5.

STATE ROADS.

1. The provisions of Pub. Laws, cap. 982, passed A act to provide for the construction, improvement Roads" (now Gen. Laws, 1909, cap. 84) does not of Public Roads to do any thing with regard to b construction remains with the towns, under the Gen. Laws, 1909, cap. 83. *McCommiskey v. Gre*

STATUTES (CONSTRUCTIO

1. The grant of extraordinary authority to a corpor lic mischief and the destruction of public rights w eral and uncertain language in a charter. *Horg*

STATUTES.

See FORCIBLE ENTRY AND DETA

STOCKS.

1. The printed form of transfer with power of attorn while it furnishes a convenient means of transf which it may be made. A transfer of ownership of unendorsed certificates, together with specific
 2. Shares of stock are or are in the nature of, chose sented by the certificates.
- The delivery of such certificates with a written as dorsement or registration, constitutes a valid gi

See DIVIDENDS, 1-2.

See TRUSTS, 1-2, 6, 8.

STREET RAILWAYS.

1. Request to charge in these words, "It was the pla directions as he approached (the street), and to which to look, as to enable him to determine coming, and if the jury find that he did not so k to do contributed to the collision, then he is gence, and he cannot recover."

Held, to state the law correctly, but the charge by the court, as to the duty of plaintiff, "to look and see if a car is approaching, and if there is a curve and the view is obstructed, to listen and see if a car is approaching," was sufficiently full and complete. *Blake v. R. I. Co.*, 213.

2. Request to charge, "If the jury should find that the running-board of the car was down, that fact would have no bearing upon the plaintiff's contributory negligence, if the jury also find that the car must have been in sight when he says he looked; because in such case he would have seen that the running-board was down, and would be obliged to manage his team, having such fact in mind."

Held, properly refused; because including an assumption of fact which it would have been improper to charge.

3. Charge of the court, "A person may see a car approaching, and it may be at such a distance, even although approaching at a high rate of speed, he may cross the track, and he is not guilty of negligence in doing so because a reasonable prudent man would infer that the car could not reach him at the speed at which he was driving his own conveyance before he got across, and under those circumstances he would not be guilty of negligence in entering upon the track."

Held, a correct statement of the law.

In an action for negligence arising out of a collision there was no direct testimony that the electric car could have been stopped after it was apparent to the motorman that plaintiff intended either to get on the track or so near thereto as to make a collision probable, although there was conflicting testimony as to the distance of the car from the place of the accident when the cart made the turn into the avenue, and as to its speed, and also as to what the motorman did in regard to stopping the car. The motorman also testified that he saw the cart when it had not got quite to the corner, and saw it turn the corner:—

Held, that the absence of any such direct testimony was not sufficient to justify the granting of a request to charge that there being no such evidence, plaintiff could not recover upon the ground that, notwithstanding his own negligence, the collision could have been avoided by the motorman; as such a statement would have been merely an inference of the witness from what he saw, which inference should properly and might in the case at bar have been properly inferred by the jury from the evidence. *Blake v. R. I. Co.*, 213.

4. In an action for negligence arising out of a collision between the wagon of plaintiff and one of defendant's cars the declaration charged as the sole breach of duty, the hiring of incompetent servants to operate the car. It appeared in evidence that plaintiff suddenly attempted to cross the track in front of the car, without notice or warning, at so short a distance as to make it impossible to stop the car, without collision; that plaintiff being in a covered wagon could not testify as to the cause of the accident, nor was any witness called on this point by him:—

Held, that the evidence neither supported the allegation of the declaration nor showed negligence on the part of defendant. *St. John v. R. I. Co.*, 447.

5. Plaintiff, who was driving in the car track in the evening, claimed that he

knew nothing of the existence of the track, owing to fog, or of the approach of the car until he saw its head light too late to avoid the accident. It also appeared in evidence that there were lights along the road which must have lighted the track sufficiently to have attracted the attention of an ordinarily careful man. Plaintiff admitted that he drove over the same road in the morning, but did not observe the track:—

Held, that upon the principle that plaintiff saw what he might have seen if he had looked, it would be assumed that he had knowledge of the existence of the track.

Held, further, that plaintiff not being required to leave the ordinarily travelled part of the road, but choosing to drive along the track, was required to exercise the degree of care commensurate with the danger to be apprehended.

Held, further, that plaintiff was guilty of contributory negligence as matter of law. *Peck v. R. I. Co.*, 449.

6. In an action arising out of a collision between the wagon of plaintiff and a car of defendant, it appeared in evidence that the wagon was outside the track in the travelled way and suddenly turned in, and when the car stopped the wagon was in front of it and the horse had almost crossed the track:—

Held, that plaintiff was guilty of contributory negligence. *Pettine v. R. I. Co.*, 488.

7. In an action on the case for negligence, arising out of a collision of defendant's car with the rear of plaintiff's covered wagon, while being driven on the car track at about 9:30 P. M., the testimony showed that no bell was rung, but the record did not show whether or not plaintiff looked to the rear for approaching cars, or the rate of speed of the car at the street crossing, or the distance from the wagon at which the motorman first saw it on the straight track of a quarter of a mile, or that any effort was made to stop the car or whether the head light was burning:—

Held, that from the record the accident appeared to be the result of the reckless act of the motorman in running down plaintiff's wagon which was lawfully on the highway at that time and place. *Pawtucket Baking Co. v. R. I. Co.*, 517.

See also COMMON CARRIERS.

STREETS.

See EASEMENTS, 1; HIGHWAYS, 1-5.

SURETYSHIP.

1. Plaintiff and defendant were co-sureties on a bond given to release an attachment conditioned as follows:—"If the final judgment shall be forthwith paid and satisfied after the rendition thereof (in case said judgment shall be rendered against the said defendant) then this obligation shall be null and void; otherwise, shall be and remain in full force and effect." After verdict against the principal for \$6,323.85, the case being in the Supreme Court on exceptions the following agreement signed by counsel, was filed May 26, 1909. "Bill of exceptions withdrawn and case remitted to the Superior Court for further proceedings," and the same day the following agreement

was filed in the Superior Court. "In the above entitled cause it is agreed that the following entry be made. Judgment and execution stayed until June 26, 1909. Upon payment of \$5,625.00 on or before June 25, 1909, case to be entered settled, otherwise execution to be issued on June 26, 1909, for full amount of judgment, interest and costs." This agreement was signed by the parties and by the court. July 1, 1909, an agreement of settlement was entered, and the same day plaintiff paid to the plaintiff in the original action the sum of \$5,625.00.

Plaintiff brings assumpsit against defendant his co-surety for contribution to the extent of one half of the amount paid.

Held, that the agreement filed in the Superior Court was the joint petition of both parties that a certain record be made, and being signed by the justice, the petition was granted and the clerk empowered to make such record, and the paper being filed by the clerk it was made a part of the record of the case, whether formally extended at that time upon the record books or not.

Held, further, that the meaning of the entry was that judgment was entered for the plaintiff on the verdict on May 26, and execution stayed until June 26. Therefore final judgment was rendered and entered and the sureties became liable on the bond unless the stay operated to discharge them.

Held, further, that the burden of proof to show that the whole transaction extended the time by which in the ordinary course of litigation the judgment creditor could have obtained execution against his judgment debtor, was upon the surety and defendant had failed to sustain such burden.

Held, further, that while a surety who voluntarily pays a debt before he is under legal liability so to do, cannot enforce contribution against his co-surety, yet in this case, as plaintiff did not pay the money until July 1, he did not pay the debt before he was under a legal obligation to do so.

Fales v. McDonald, 406.

SURPLUS.

See MORTGAGES, 3.

SURRENDER AND ACCEPTANCE.

See LANDLORD AND TENANT, 1-3.

TAXATION.

1. A tax deed has no binding force against a party whose interest in the property which is the subject of sale appears upon the records, unless the notice required by statute has been given such party in interest. *Baxter v. Patenaude*, 197.
2. A building was erected upon leased land, the lease being unrecorded, and was taxed as real estate under the provisions of Gen. Laws, cap. 45, § 2 (now Gen. Laws, 1909, cap. 57, § 2) "buildings on leased land, the leases whereof are in writing and recorded, shall, for the purposes of taxation, be deemed real estate." After levy and sale;—

Held, that the lease never having been recorded the building was not to be deemed real estate, but should have been assessed as personal property and

the appropriate proceedings taken for the collection of the tax, and the levy and sale as real estate was null and void.

3. Where a tax-sale deed appears upon its face to have been made pursuant to law, as shown by its recitals, which are by statute made "evidence of the facts stated" and it is necessary to resort to extrinsic evidence to show the existence of facts rendering the levy and sale null and void, a bill in equity may be maintained to set aside such deed under the rule that where an instrument is made by statute *prima facie* evidence of the regularity of proceedings connected with the assessment and sale for taxes, equity will set aside such instrument for defects, although such defects are apparent on the face of the proceedings leading up to the execution of the instrument. *Lindgren v. Doughty*, 524.

TAX COLLECTOR.

See PLEADING AND PRACTICE, 4.

TAX SALE.

See TAXATION, 1.

TEAMER AND HIRER.

See MASTER AND SERVANT, 4-7.

TITLE.

In 1870, X. caused plats of certain unimproved property to be made and recorded, which plats included the "*locus in quo*." Prior to that time he had fenced in a portion of the property, including the "*locus*." Thereafter he staked out lots, graded streets, and posted advertisements on the land and publicly sold house lots and asserted his ownership thereof. There was no evidence that the predecessors in title of plaintiff or any other person sought to interfere with these acts of ownership, until the issuing of the writ in trespass and ejectment 26 years thereafter. Both plaintiff and defendant claimed under paper titles from a common ancestor.

Held, that the paper title of the defendant was as good as that of plaintiff, and that such possession of the land as had existed had been upon the part of ancestors in title of the defendant. *Baxter v. Palenau*, 197.

See FORCIBLE ENTRY AND DETAINER, 1.

TOWN COUNCIL.

The town council is not the corporation known in the law as the town. *Town of East Greenwich v. Guenond*, 224.

See HIGHWAYS, 1; MUNICIPAL CORPORATIONS, 2; TOWN TREASURER, 1-3.

TOWN TREASURER.

1. In an action against a town treasurer under the statute, he has complete control of the defence, without any authority over him by the town council.
2. A town treasurer is not removable even for cause, by a town council. *Barber v. Barber*, 266.
3. A town council has no jurisdiction to order the payment from the town's funds, either of an original claim or of the judgment thereon, until the tax-paying electors have made an appropriation therefor. Whatever sum is so appropriated, it is the duty of the town treasurer to pay, and he is entitled to receive in reimbursement of a judgment paid by him, whether the same be sanctioned or repudiated by the town council. *Barber v. Barber*, 266.

See MUNICIPAL CORPORATIONS, 1; PLEADING AND PRACTICE, 4.

TOWNS.

See FORCIBLE ENTRY AND DETAINER, 1; MUNICIPAL CORPORATIONS, 1; TOWN COUNCIL, 1.

TRACKS CROSSING OF, ON RAILWAY.

See STREET RAILWAYS, 1-7.

TRANSFER OF STOCK.

See STOCKS, 1-2.

TRESPASS.

See FORCIBLE ENTRY AND DETAINER, 2.

TRIAL.

1. Counsel in their argument to the jury, may be permitted, in the discretion of the trial judge, to read to the jury from testimony in the case. *Podrat v. Narr. Pier R. R. Co.*, 255.

TROVER.

1. Plaintiff leased a farm to defendant, under an agreement by which defendant was not to remove any hay or straw from the farm.
Held, that plaintiff had neither title or right of possession so as to enable him to maintain an action for the conversion of the property by defendant, his remedy being for breach of an executory contract. *Horton v. Amoral*, 520.

TRUSTS.

1. In order to create a valid voluntary trust, *inter vivos*, where the donor is not trustee, there must be an intent to make a present transfer of ownership upon trust, and the donor must do everything that according to the nature of the property, is necessary to execute that intent.
2. After death, executors found, in safe deposit of testator, certificates of stock in name of testator, unendorsed; and also certain instruments, signed by

testator, purporting to create trusts in various al-
same to trustees to pay the income therefrom to
his death to various beneficiaries.

Upon the question as to whether testator created va-
Held, that the two questions to be determined were
testator intended to make a present transfer of the
second, one of law, as to whether he did all that
the ownership of the shares.

Held, that from the instruments themselves and f-
testator intended to create trusts in the shares
means of and upon delivery to the trustees of
assignments.

Held, further, that, from the evidence, the several
trustees of the certificates and assignments were
pleted trust *in presenti*, although there was at the
other trustees, and they were not notified of the
after the donor's death, and that such delivery was
to be done by the donor to transfer the ownership

Held, further, that the facts that he did not endorse
received the dividends after the trusts were created
inform but one of the four trustees, about the facts
of the case, inconsistent with an intent to
Talbot v. Talbot, 72.

3. Where a settlor reserves a life interest, the re-
inconsistent with an intention to create a present t
4. In determining the question of intention to creat
should be construed as strongly as possible in favo
5. In attempting to create a present trust it is not imp
ing the assignment of the stock certificate to the tr
it to the donor, since a delivery is not defeated b
ment.
6. A power of revocation contained in an assignment
trust, does not affect the validity of the delivery
created.
7. Delivery to and acceptance by the trustee, or even
his part, are not essential to the validity of the tr
and the fact that the trustee declines to execute th
or affect the rights of beneficiaries.
8. A conveyance of stocks in trust is none the less pr
that one of the evident purposes of the trust was to
the property after the donor's death. *Talbot v. Tal*
9. Testamentary bequest directed trustee to collect th
ment of expenses, to pay over the same to wife
when in his judgment necessary and proper for t
of the wife, to sell so much of the trust estate as
apply the proceeds to "her support in comfort duri
decease to convey any of the trust property rema
expended to such persons as at my wife's death sha

Upon the question whether after decease of widow had authority to apply the trust property in satisfaction of a claim for board, nursing, attendance, medicine and medical services furnished to the widow prior to her decease, whether or not authorized by the trustee:—

Held, that the manifest purpose of the will being to make suitable provision for the comfortable support of the wife, the whole trust estate stood pledged for such purpose, and the trustee would be in the exercise of his rights by discharging the obligations incurred for such support, provided, in case he did not authorize such charges, that they were reasonably appropriate for her comfortable support.

10. *Held*, further, that there was no immediate vesting in possession of the interest of the next of kin upon the death of the wife, but the act of the trustee was necessary to convey the trust property to the next of kin.
11. *Held*, further, that there was an appropriation of a fund for a specific purpose with a designation of a class of persons with capacity to receive upon the happening of an event, the persons who might take and the amount they would take being contingent, and in no sense a remainder.
12. *Held*, further, that the question as to the duration of a discretionary power under a trust is one of intention evidenced by the whole instrument containing the power. Such power remained in the present succeeding trustee, and he was still authorized to sell sufficient of the trust estate to defray the expenses incurred for the comfortable support of the widow to the same extent that he would have been authorized by the trust to provide her support in comfort during her life. *Perry v. Hall*, 299.

See WILLS, 1-8.

VALUE.

See DAMAGES, 2.

VARIANCE.

See PLEADING AND PRACTICE, 3.

VERDICT (DIRECTION OF).

See PLEADING AND PRACTICE, 9.

VERDICTS.

1. Where it is not shown that the jury disregarded the law as given them by the court, it is to be assumed that the verdict is in accordance with the instructions given. *State v. Papa*, 453.
2. Where a jury was instructed that to find for plaintiff they should be satisfied that a policy of insurance was actually the contract of insured or that the beneficiary had an insurable interest in the life of insured, a general verdict for plaintiff (beneficiary) must be regarded as a finding of one or the other of such facts. *Mohr v. Prudential Ins. Co.*, 177.

See JURORS, 1.

WAIVER.

See INSURANCE (LIABILITY), 1-3.

WILLS.

1. Testamentary devise as follows:—"I give, devise and bequeath to my executor, all my real and personal estate of every kind in trust to receive the rents and profits of my real estate until it shall be sold and to sell my real and personal estate and convert the same into money as soon as may conveniently be done after my decease, and on such terms as he may deem proper and to dispose of said rents and profits and of the proceeds of the sale of my real and personal estate in the manner hereinafter directed;" *i. e.* "to divide all the rest, residue and remainder of my real and personal estate or the proceeds thereof into three equal shares and to pay over one of such shares to A. if he shall have attained the age of 25 years at the time of my decease" and with other similar provisions for the payment of the other two shares to B. and C. if they had attained such age at that time; with directions in case any of the beneficiaries should be living and under the age of 25 years at death of testatrix, that the executor should hold such share in trust until the attaining of that age.

"I appoint my nephew X. the executor of and trustee under this will." X. having deceased, Y. was appointed administrator with the will annexed and substituted trustee:—

On special case stated for construction of will:—

Held, that:—the express intention of testatrix was that all the residuary real estate should be converted by executor into personal property, and that the beneficiaries should receive personal and not real estate.

2. An absolute and not discretionary direction to an executor to sell real estate and distribute the proceeds of the sale as money or invest them in personal property works an out and out conversion of the real estate into personalty, so that the interests of the beneficiaries must be treated for all purposes in equity as personal and not real property from the date of testator's death.
3. When a testator directs his executor to sell his real estate, a discretion given the executor as to the time, manner, or terms of sale will not prevent an equitable conversion from taking place.
4. *Held*, further, that, in this case, the duty of the executor to sell was absolute, and not discretionary, since the power given him was in trust and its exercise was compulsory.
5. *Held*, further, that the legal title to the real estate in question was given to the executor, and the residuary legatees got no right, title, or interest in it, legal or equitable, which could be conveyed by them or upon which attachment could be levied.
6. The powers of sale conferred upon the executor by the will vested under Gen. Laws, 1909, cap. 312, § 26, in the administrator with the will annexed upon his appointment and qualification as such.
7. *Held*, further, that, while it might be necessary for the executor to hold some of the proceeds of the sale in trust for a time, this did not alter the nature of the power of sale, and the administrator must exercise the power in his capa-

city as administrator having no active duties as trustee until he had set aside the share of C., who was under 25 years of age, which he should hold in trust for her.

8. *Held*, further, that the administrator might sell and convey the property so as to convey all the right, title, and interest of testatrix free and clear of any incumbrances attempted to be placed upon it since the decease of testatrix, either by way of attachment in suits against the beneficiaries or by way of deed from one of such beneficiaries. *In re Adams*, 41.
9. Testamentary provision: "After the decease or marriage of my wife, I give, devise, and bequeath all said estate to her children to be and remain to them their heirs and assigns forever. Excepting however from the provisions of this clause, the heirs of my daughter Nettie G. Eddy, deceased." Nettie G. Eddy was the name of testator's granddaughter, the daughter of his daughter, who married an Eddy.

Held, that the plain intent was to exclude the heirs of his daughter from participation in the residue, and to devise it to the children of his wife living at the time of her death.

Held, further, that the word "children" in a will, is to be understood in its simple and primary signification when possible, and not so as to include grandchildren, unless it is necessary to hold so to give effect to the words of the will, or to the evident intent of testator. *Eddy v. Mathewson*, 53.

10. Testatrix, desiring to preserve her family seat as a home for her children, by testamentary devise directed her executor to have the farm laid out in as many plots, approximately equal to each other, as there should be children or issue of deceased children then surviving her, and to apportion the plots among such persons, and devised one of said plots to each of such children (or issue of deceased children, as tenants in common), in accordance with the apportionment of the executor, and provided that "all the devises of portions of my (farms) are made upon the condition that if any of my children or grandchildren shall voluntarily or involuntarily alienate or devise the portion of said lands set apart to him or to her other than to some descendant of mine (except for life to the wife or husband of some descendant) while such descendant may be living and without the consent of all my descendants, who shall at the time be of full age and competent to convey and devise real property, in such event the interest of such child or grandchild therein shall cease and be determined and such estate shall thereupon vest in my other descendants then living *per stirpes* and not *per capita*."

Held, that the words "while such descendant may be living" following the parenthesis should be read as if included within the parenthesis, as referring to the last word "descendant" within the parenthesis, so as to read "except for life to the wife or husband of some descendant while such descendant may be living."

Held, further, that the effect of the clause was to devise to the persons therein named, as tenants in common, an estate in fee subject to the power given the executor to divide the same, and subject to the restrictions upon alienation of the portions so divided.

11. *Held*, further, that no estate was devised to the executor but only a power of division and allotment, which was a power in trust.

12. *Held*, further, that the restriction was placed upon the property and as the breach of the condition must occur and thereon must vest, if at all, within the lifetime of the testatrix, in being at decease of testatrix, the restriction against perpetuities.
13. The fact that a restriction upon alienation is limited in itself make such restraint valid, if it is otherwise valid in its scope and effect as to operate as a substantial alienation for such limited time.
- Held*, further, that the restraints upon voluntary alienation and so nearly absolute in their character that that the law was well settled that such restraints as to provide against involuntary alienation, through proceeds of devisees, were also void.
14. *Held*, further, that the restraint on alienation under the general scheme of testatrix to provide that her child and deceased child, should have parts of these estate areas, that they might have neighboring sites for their own use, intention therefore should be made effective, and as was held to be void should be disregarded.
15. Where invalid portions of a will can be separate without violence to the general testamentary scheme, they will be disregarded and those which are valid, upheld.
- Held*, further, that the clause was valid as to devisees and as to the restraint upon alienation.
16. The power or right of alienation includes the power to dispose of property held in fee in such manner as the owner may see fit, in trust, by will, or by sale, or other mode of conveyance, of the owner, whether of benevolence or to obtain money, or for any other purpose, and the power is not subject to the owner's debts so that his creditors can compel themselves thereof through proper proceedings.
17. Testamentary devise to X. of the residue for life, with power to diminish my son Y. in sickness and in health with benefit of curacy, that he is well provided for and taken good care of, and I hereby bind all the real estate and personal property of the testatrix to his support; after the death of X., I give devise to the children of my son Z. all the remainder of my real estate divided in equal shares between them, to them and their heirs they being bound to the support of my son Y. and his daughter X." X. was appointed executrix, and upon her decease, whereupon an administrator was appointed, the portions to be determined were as to the rights of the devisees and bequeathed to the children of Z., and of Y., was a charge upon the real and personal estate of the guardian of Y. was entitled to receive from such devisees in remainder and said administrator, the amount of the same applied from the separate estate of his ward Y.

Held, that Y., by virtue of the provisions for his support for life, stood in the relation of legatee to the estate, and that the legacy was an express charge upon all the residuary estate to secure such support during the life of Y., and the residuary devisees were entitled to nothing except what was left after the legacy to Y. was paid.

18. *Held*, further, that the administrator should hold the personal estate charged as above, until after the death of Y.

Held, further, that, while it was the intent of testator that Y. should reside and be supported upon the homestead property, his guardian could exercise a proper discretion as to his future place of abode.

19. *Held*, further, that the remainder created by the will vested at the death of testator in all the children of Z. then living, subject to open and let in any children of Z. born after the death of testator, and before the death of X., the life tenant.

20. One of the children of Z. was living at the death of testator, but deceased intestate without ever having issue born alive, and leaving her father Z. and husband her surviving.

Held, that she became entitled at death of testator to a vested remainder in an undivided part of the residuary real estate, which passed to her father Z. as sole heir at law, and which, upon his death intestate, passed to his heirs at law, viz.: all his remaining children, while as to that portion of the residuary personal estate, her husband become entitled to administer upon her estate, and might hereafter become entitled to demand as such administrator such proportional part of such estate as she would have been entitled to, if she had survived, at the time of its distribution.

21. *Held*, further, that the guardian of Y. was entitled to recover from the administrator, out of the personal estate, such an amount as should be shown to have been necessarily and properly expended for his support, out of his own individual estate, so that such individual estate might be reimbursed for any depletion caused by the failure of the residuary devisees to furnish him with support under the terms of the will.

22. *Held*, further, that, as the personal estate appeared to be ample for the support of Y., owing to his advanced age, it was unnecessary at this time to decree sale of the real estate. *Greene v. Rathbun*, 145.

WITNESSES.

1. The statement of the presiding justice to the jury that "it is unfortunate that the defendant's attorney should feel under any obligation to send for one of the witnesses for the State." "That is an unfortunate circumstance, to say the least. The State's witnesses should be left alone by the defendant," is error prejudicial to the rights of the defendant.

Witnesses are not parties and may be summoned by either side of a controversy, and counsel not only have the right, but owe the duty to clients to interview witnesses of an occurrence in their investigation of the case, although such witnesses may be under summons at the time. *State v. Papa*, 453

"CHILDREN," "GRANDCHILDREN"

See WILLS, 9.

"MANU FORTI," see FORCIBLE ENTRY AND DETOUR
see FORCIBLE ENTRY AND DETOUR

WRITS.

1. As the statutes do not authorize service upon a town of enforcing a claim against a town, a town is not bound and any judgment based on such service was reversed. *Barber*, 286.

2. Service of a writ of summons upon a manufacturer as appeared by the return by leaving a copy of the writ at the defendant.

Held, that, as under the provisions of C. P. A., cap. 300, § 4) service of a writ of summons upon a manufacturer as such, can only be made when the action is against the company, and no other valid service appeared in the return, legal service of the writ. *Amer. Electrical Works v. De*

3. Gen. Laws, 1909, cap. 32, § 15 provides that any act shall be so far deemed a public act that the act shall be given in evidence, without specially pleading the act, notice of an act of incorporation which provides that the company have a place of business in a designated city will satisfy this requirement, thus showing that where the company is upon the company in another town that such is the case of the company. *Amer. Electrical Works v. De*

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